Supreme Court, U.S.
FILED

091235 APR 12 2010

OFFICE OF THE CLERK

159

No. 09-____

IN THE
Supreme Court of the United States

SHOODLEY LEE CHERICHEL,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JONATHAN L. MARCUS
Counsel of Record
ANN O'CONNELL
PETER SAHARKO
COVINGTON & BURLING LLP
1201 Pennsylvania Ave NW
Washington, DC 20004
(202) 662-6000

April 12, 2010 *Counsel for Petitioner*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the "specific intent" requirement of the Convention Against Torture is satisfied where, in accordance with the standard articulated by the Office of Legal Counsel for the Department of Justice and by this Court in analogous circumstances, Mr. Cherichel's severe and prolonged pain and suffering in the inhumane conditions of a Haitian prison is practically certain to follow from Haiti's deliberate policy of subjecting criminal deportees to indefinite detention.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Petitioner Shoodley Lee Cherichel is a Haitian national who has resided in the United States for over twenty-seven years.

Respondents are Eric H. Holder, Jr., in his official capacity as Attorney General of the United States, and Janet Napolitano, in her official capacity as United States Secretary of Homeland Security.

The parties listed above include all the parties to the proceeding in the court of appeals.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT ii

OPINIONS BELOW 3

JURISDICTION 3

TREATIES AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 14

A. The Eighth Circuit Decided A Substantial Question of Federal Law On Which Two Federal Agencies Are Divided. 15

B. The Eighth Circuit's Interpretation of "Specific Intent" Conflicts With Prior Decisions of This Court 19

C. The Federal Issue Is Important 23

CONCLUSION 26

Appendix A—(*Cherichel v. Holder*, 591 F.3d 1002 (8th Cir. 2010)) 1a

Appendix B—(*Cherichel v. Holder*, No. 08-3736 (8th Cir. March 18, 2010) (order staying mandate)) 35a

Appendix C—(*In re Cherichel*, No. A095-204-110 (BIA Oct. 29, 2008)) 36a

Appendix D—(*Cherichel v. Mukasey*, No. 07-3313 (8th Cir. March 26, 2008) (order granting motion to remand) 43a

Appendix E—(*Cherichel v. Mukasey*, No. 07-3313 (8th Cir. March 26, 2008) (mandate)) 45a

Appendix F—(*In re Cherichel*, No. A095-204-110 (BIA Sept. 14, 2007)) 46a

Appendix G—(*In re Cherichel*, No. A095-204-110 (Executive Office of Immigration Review May 3, 2007) (IJ Opinion)) 56a

Appendix H—(Provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) 94a

Appendix I—(Excerpts of the Congressional Record – Senate) 96a

Appendix J—(Provisions of the Senate Executive Report on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment) 97a

Appendix K—(Provisions of the Department of Justice Regulations Concerning the Convention Against Torture) 98a

Appendix L—(Office of Legal Counsel Opinion (Dec. 30, 2004)) 103a

TABLE OF AUTHORITIES

Page(s)

CASES

California v. Hodari D., 499 U.S. 621 (1991) 19

Carter v. United States, 530 U.S. 255 (2000) 19

Clark v. Martinez, 543 U.S. 371 (2005) 3, 14, 15, 22

Electronic Privacy Information Center. v. Department of Justice, 584 F. Supp. 2d 65 (D.D.C. 2008) 23

Helling v. McKinney, 509 U.S. 25 (1993).....18, 19

In re J-E-, 23 I. & N. Dec. 291 (BIA 2002) 2, 7, 18

Pettibone v. United States, 148 U.S. 197 (1893).....21

Pierre v. Gonzales, 502 F.3d 109 (2d. Cir. 2007)..... 22, 23

Ratzlaf v. United States, 510 U.S. 135 (1994).....20

Screws v. United States, 325 U.S. 91 (1893) 21

State v. Bull, 512 S.E.2d 177 (W. Va. 1998).....22

State v. Jackoweski, 915 A.2d 767 (Vt. 2006).....22

Tenaska Washington Partners II, L.P. v. United States, 34 Fed. Cl. 434 (1995).....23

Tison v. Arizona, 481 U.S. 137 (1987) 20

United States v. Bailey, 444 U.S. 394 (1980).....20

United States v. Bradley, 196 F.3d 762 (7th Cir. 1999).....21

United States v. Johnstone, 107 F.3d 200 (3d. Cir. 1997) 21

United States v. Neiswender, 590 F.2d 1269 (4th Cir. 1979) 21, 22

United States v. U.S. Gypsum Co., 438 U.S. 422 (1978).....20

Vacco v. Quill, 521 U.S. 793 (1997) 20

STATUTES

8 U.S.C. § 1229(a)(1) 3

8 U.S.C. § 1252(b)(2) 3

8 U.S.C. § 1254a(c)(2)(B)(i) 25

18 U.S.C. § 2340A.....5, 15

18 U.S.C. § 2340 5

28 U.S.C. § 1254(1).....3

Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 5

REGULATIONS

8 C.F.R. § 208.16 .....4, 6, 11

8 C.F.R. § 208.18 .....4, 6, 17

8 C.F.R. § 1003.15 3

OTHER AUTHORITIES

136 Cong. Rec. S17,491 (1990).....1, 4, 5, 15

Black's Law Dictionary (6th ed. 1990).....18

Black's Law Dictionary (7th ed. 1999).....18

Black's Law Dictionary (9th ed. 2009).....13, 16, 18

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 .....*passim*

C. Crawford, *Chaos Rules in Quake-Ruined City*, Daily Telegraph (Aus.), Jan. 15, 2010 .....13, 14

DHS, Statement by Deputy Press Secretary Matt Chandler (Jan. 13, 2010), *at* http://www.dhs.gov/news/releases/pr_1263409824202.shtm.....25

DHS, Statement from Homeland Security Secretary Janet Napolitano on Temporary Protected Status for Haitian Nationals (Jan. 15, 2010), *at* http://www.dhs.gov/ynews/releases/pr_1263595952516.shtm.....25

DOJ, Office of Legal Counsel, *Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002) (Memorandum from Jay Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President), *available at* http://www. washingtonpost.com/wp-srv/politics/documents/ cheney/torture_ memo_aug2002.pdf.....8

DOJ, Office of Legal Counsel, *Legal Standards Applicable Under 18 U.S.C. §§ 2340 - 2340A* (Dec. 30, 2004) (Memorandum from Daniel Levin, Acting Assistant Attorney Gen., to James B. Comey, Deputy Attorney Gen.), *available at* http://www.justice.gov/olc/18usc 23402340a2. htm .....*passim*

Michelle Faul, *Haiti Earthquake Sheds Light on Dismal Prison Conditions*, Deseret Morning News, Mar. 7, 2010.....24

S. Exec. Rep. No. 101-30 (Aug. 30, 1990) 4, 17

U.S. Dep't of State, Bureau of Democracy, Human Rights & Labor, 2006 Country Reports on Human Rights Practices: W. Hemisphere – Haiti (Mar. 6, 2007) 6

PETITION FOR A WRIT OF CERTIORARI

Article 3 of the Convention Against Torture (CAT) prohibits the removal of a person from one state to another where there are substantial grounds for believing that he would be in danger of being tortured. To constitute torture under the United States' understanding of that term, the perpetrator must "specifically intend[] to inflict severe physical or mental pain or suffering." 136 Cong. Rec. S17,491 (1990), App. 96a. Agencies of the executive branch disagree on whether this specific intent standard requires that the perpetrator act with the purpose to accomplish the prohibited result, or whether the standard may also be satisfied if he has knowledge that the prohibited result is practically certain to follow from his conduct.

At stake in this interpretative dispute are the futures of Haitian nationals like Petitioner Shoodley Cherichel, who has been ordered removed to Haiti after living in the United States for over twenty-seven years. When Mr. Cherichel is removed to Haiti, the Haitian government will imprison him indefinitely in horrific conditions that have tragically become even worse since the June 12, 2010 earthquake. This detention is unrelated to the four-year criminal sentence he has already served in the United States. Respondent does not dispute that these conditions are certain to cause severe and prolonged suffering. The question is whether this suffering is inflicted with specific intent.

In Mr. Cherichel's case, the Eighth Circuit endorsed the Board of Immigration Appeals' (BIA) conclusion that Haitian officials lacked specific intent to torture, despite their admitted awareness that people in Mr. Cherichel's position face certain suffering. In so holding, the Eighth Circuit followed a 2002 BIA decision, *In re J-E-*, which held that Haitian officials do not act with specific intent unless they "intentionally and deliberately creat[e] and maintain[] [inhumane] prison conditions in order to inflict torture." 23 I. & N. Dec. 291, 301 (BIA 2002).

The BIA's interpretation conflicts with a 2004 Opinion of the Office of Legal Counsel (OLC), which concludes that the CAT's specific intent requirement can be satisfied not only in circumstances where a perpetrator acts with the purpose to inflict a prohibited result, but also when he knows the result is practically certain to follow from his conduct.

The Eighth Circuit's decision also conflicts with decisions of this Court, which recognize that a person has specific intent when he acts with either the purpose to cause the prohibited result, *or* with knowledge that the prohibited result is practically certain to follow. Because the BIA applies a more narrow specific intent standard to refoulement under Article 3 of the CAT than the Department of Justice applies to criminal prosecutions under Article 4 of the CAT, the Eighth Circuit's opinion also violates the established rule of construction that the meaning of words in a statute cannot change

with the statute's application. *See Clark v. Martinez*, 543 U.S. 371, 378 (2005).

Certiorari should be granted to resolve these conflicts and to ensure that all individuals are protected from torture to the extent required by the United States' obligations under the CAT. The timing is particularly urgent, because the removal of deportees like Mr. Cherichel to earthquake-ravaged Haiti could resume at any time.

OPINIONS BELOW

The opinion of the court of appeals (App. App. 1a-34a) is reported at 591 F.3d 1002. The opinion of the immigration judge (IJ) (App. 56a-93a) and both opinions of the BIA (App. 36a-42a, 46a-55a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2010. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Eighth Circuit had jurisdiction pursuant to 8 U.S.C. §§ 1229(a)(1) and 1252(b)(2), and 8 C.F.R. § 1003.15.

TREATIES AND STATUTORY PROVISIONS INVOLVED

Article 3, paragraph 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, App. 95a, provides:

> No State Party shall expel, return ("refouler") or extradite a person

> to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Section 208.18(a)(5) of the Department of Justice Regulations Concerning the Convention Against Torture, Title 8, Code of Federal Regulations, App. 101a, provides, in relevant part:

> In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

The other relevant provisions of the CAT, the Proceedings and Debates of the 101st Congress, Second Session, 136 Cong. Rec. S17,491 (1990), the Senate Executive Report on the CAT, S. Exec. Rep. No. 101-30 (Aug. 30, 1990), and the Department of Justice Immigration Regulations, 8 C.F.R. §§ 208.16-208.18, are reproduced in the Appendix. App. 94a-102a.

STATEMENT OF THE CASE

1. The Convention Against Torture. Article 3 of the CAT prohibits the removal or "refoulement" of a person from one state to another where "there are substantial grounds for believing that he would be in danger of being subjected to torture." CAT, Dec. 10, 1984, S. Treaty Doc. No. 100-20, art 3, ¶ 1

(1988), 1465 U.N.T.S. 85, App. 95a. In addition to prohibiting refoulement in certain circumstances, the CAT also requires "[e]ach State Party [to] ensure that all acts of torture are offences under its criminal law." *Id.* art. 4, ¶ 1, App. 95a. The CAT defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . ." *Id.* art. 1, ¶ 1, App. 94a.

President Reagan signed the CAT on April 18, 1988, and sent it to the Senate for advice and consent on May 20, 1988. *Id.* at iii. President Bush proposed, and the Senate adopted, an understanding that "in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering." 136 Cong. Rec. S17,491 (1990), App. 96a.

In 1994, Congress implemented the CAT by adding a provision prohibiting torture to the criminal code. *See* 18 U.S.C. § 2340A. The criminal torture statute defines torture as "an act committed by a person acting under the color of law *specifically intended* to inflict severe physical or mental pain or suffering . . . . upon another person." *Id.* § 2340 (emphasis added).

Later, in response to the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681, 2682, the Department of Justice further implemented the CAT by amending the regulatory procedures for removal. Those regulations prohibit the removal of aliens who are more

likely than not to be tortured in the country of removal. *See* 8 C.F.R. § 208.16(c), App. 98a-99a. The regulations define torture as "an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . ." *Id.* § 208.18(a)(1), App. 100a. Section 208.18(a)(5) elaborates on the intent requirement:

> In order to constitute torture, an act must be *specifically intended* to inflict severe physical or mental pain or suffering. An act that results in *unanticipated or unintended* severity of pain and suffering is not torture.

Id. (emphasis added), App. 101a.

2. ***In re J-E-.*** Citizens deported to Haiti after completing prison sentences in foreign countries are often detained in the horrific conditions of Haitian prisons, despite not having violated any domestic laws of Haiti. U.S. Dep't of State, Bureau of Democracy, Human Rights & Labor, 2006 Country Reports on Human Rights Practices: W. Hemisphere – Haiti (Mar. 6, 2007). The practice continues despite a Haitian court ruling that such detentions are not valid. App. 84a-85a. Absent support from family or friends, detention continues indefinitely. App. 86a.

In 2002, a Haitian national who had been ordered removed to Haiti sought relief under the CAT based on Haiti's indefinite detention of criminal deportees in inhumane prison

conditions where police mistreatment runs rampant. *In re J-E-*, 23 I. & N. Dec. 291, 292 (BIA 2002). The BIA concluded that although Haitian authorities intentionally detain criminal deportees, knowing that they will experience severe and prolonged pain and suffering, Haitian officials do not "specifically intend" to inflict that result on the detainees, because Haitian authorities were not "intentionally and deliberately creating and maintaining such prison conditions in order to inflict torture." *Id.* at 301. Instead, the BIA concluded that the inhumane conditions "are the result of budgetary and management problems as well as the country's severe economic difficulties." *Id.*

Six Board members dissented from the opinion, concluding that the Haitian policy of indefinitely imprisoning criminal deportees amounted to torture. The dissenting Board members noted that "[w]e are in the early stages of the very difficult and thankless task of construing the Convention. Only time will tell whether the majority's narrow reading of the torture definition and its highly technical approach to the standard of proof will be the long-term benchmarks for our country's implementation of this international treaty." *Id.* at 309 (Schmidt, Board member, dissenting).

3. Office of Legal Counsel Opinions. The BIA majority's "narrow reading of the torture definition" mirrored a 2002 Office of Legal Counsel opinion interpreting the

criminal torture statute, which implements the United States' obligations under Article 4 of the CAT. *See* DOJ, Office of Legal Counsel, *Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002) (Memorandum from Jay Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President), *available at* http://www.washingtonpost.com/wp-srv/politics/documents/cheney/torture_ memo_aug2002.pdf. The 2002 Office of Legal Counsel opinion concluded that "knowledge alone that a particular result is certain to occur does not constitute specific intent." *Id.* at 4.

In 2004, the Office of Legal Counsel *explicitly repudiated* this definition of specific intent. The 2004 opinion recognizes that the term "specific intent" is ambiguous and that courts "do not use it consistently." DOJ, Office of Legal Counsel, *Legal Standards Applicable Under 18 U.S.C. §§ 2340 - 2340A*, at 16 (Dec. 30, 2004) (Memorandum from Daniel Levin, Acting Assistant Attorney Gen., to James B. Comey, Deputy Attorney Gen.), *available at* http://www.justice.gov/olc/18usc23402340a2.htm, App. 137a.

The 2004 opinion cites Professor LaFave's treatise on criminal law to conclude that specific intent could be found where (1) a person deliberately inflicts severe physical or mental pain or suffering on a person, *or* (2) when he "knows that the result is practically certain to follow from his conduct, whatever his desire may be as to that result."

Id. (quoting 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.2a, at 341 (2d ed. 2003)), App. 137a-138a.

The 2004 opinion squarely repudiates the definition of specific intent set forth in the 2002 opinion:

> In the August 2002 Memorandum, this Office concluded that the specific intent element of the statute required that infliction of severe pain or suffering be the defendant's "precise objective" and that it was not enough that the defendant act with knowledge that such pain "was reasonably likely to result from his actions" (or even that that result "is certain to occur"). We do not reiterate that test here.

Id. at 16-17 n.27 (citation omitted), App. 139a.

4. The Immigration Judge's Decision. Mr. Cherichel was placed in removal proceedings after he was convicted on January 13, 2005, in Minnesota state court of one count of criminal vehicular homicide and one count of criminal vehicular operation resulting in substantial bodily harm, both arising out of a one-car accident in which he drove his car off the road. App. 58a-59a.[1] After conducting a

[1] During his removal proceedings, the IJ also found that Mr. Cherichel was convicted of possession of marijuana in Kentucky state court in 2000. App. 75a-76a.

removal hearing, the IJ issued an opinion granting Mr. Cherichel relief under Article 3 of the CAT. App. 80a-91a.

Mr. Cherichel was born in Haiti on November 23, 1979. App. 58a. In 1982, when he was two or three years old, he entered the United States without inspection. *Id.* He has lived in the United States ever since, never returning to Haiti. App. 65a. He does not speak Creole, Haiti's official language, and he understands very little Creole when it is spoken to him. *Id.* Mr. Cherichel has no relatives remaining in Haiti. *Id.*[2]

The IJ found that it was more likely than not that Mr. Cherichel would be tortured upon his removal to Haiti. App. 91a-92a. The IJ based this finding on evidence that criminal deportees in Haiti are held indefinitely in inhumane conditions unless they have family or friends who are willing to claim responsibility for them in writing. App. 86a.

The IJ set forth detailed evidence of the horrible prison conditions in Haiti. App. 82a-87a. Prisoners suffer from malnutrition, physical abuse, lack of hygiene, poor health care, rodent infestation, lack of adequate food and water, disease, guard corruption, riots, and violence. App. 84a. Beatings, ear boxing, and

---

[2] Mr. Cherichel's mother is a naturalized U.S. citizen, as are his two brothers. App. 65a. Mr. Cherichel's father, who is now deceased, was also a naturalized U.S. citizen. *Id.*

withholding of medical treatment are common for those in custody, resulting in deaths. App. 83a. The prisons are also extremely overcrowded, sometimes housing forty men in a twelve-by-fifteen foot cell, knees to chin, with no toilet or sink. App. 85a-86a. These conditions are far below the level required by the Standard Minimum Rules for the Treatment of Prisoners, and they are getting worse. App. 83a, 85a.

Based on these horrific conditions, the IJ concluded Mr. Cherichel would suffer "severe physical or mental pain and suffering," the physical element of torture set forth in 8 C.F.R. § 208.16, App. 90a-92a. The IJ also concluded that Mr. Cherichel satisfied his burden to show that this pain and suffering would be inflicted with the requisite specific intent, relying on the 2004 Office of Legal Counsel Opinion. App. 90a-91a. The IJ concluded that "[t]he Haitian authorities are aware of the conditions in their prisons and jails and yet no progress has been made to improve these conditions in the last five years." App. 91a. The IJ thus found that Mr. Cherichel "satisfied his burden of proof" to obtain CAT relief by showing that he would suffer at the hands of people who "know[] that the result is practically certain to follow from [their] conduct." App. 90a-92a.

5. **The Board of Immigration Appeals' Decision.** On October 29, 2008, the BIA issued a decision ordering Mr. Cherichel

removed to Haiti. App. 36a-38a.[3] The BIA concluded that "the record does not demonstrate that Haitian authorities specifically intend to inflict severe physical or mental pain or suffering to criminal deportees," because Mr. Cherichel did not prove that the Haitian government had deliberately created horrible prison conditions in order to inflict torture. App. 39a. Rather, the BIA concluded that those conditions persist in Haitian prisons because of "budgetary and management problems as well as the country's severe economic difficulties." App. 40a (citation omitted).

6. The Eighth Circuit's Opinion. The Eighth Circuit denied Mr. Cherichel's petition for review. App. 1a-2a.

The court acknowledged that the term specific intent "is not always defined or applied

---

[3] The BIA first issued an opinion in Mr. Cherichel's case on September 14, 2007, sustaining DHS's appeal and ordering Mr. Cherichel removed to Haiti. App. 46a. In that opinion, the BIA reviewed the evidence and came to its own conclusions, stating that "while we see no clear error in the [IJ]'s findings regarding the abysmal nature of prison conditions in Haiti, we do not find that such conditions suffice to meet the burden of proof under the [CAT]." App. 52a.

After Mr. Cherichel sought appellate review of that decision, the Eighth Circuit granted the government's request to remand the case to the BIA "for reconsideration in light of its scope of review and to further remand to the immigration judge if it determines that further factfinding is necessary." App. 43a.

consistently." App. 23a. Nonetheless, the court stated that specific intent is a "term of art with a well-known, oft-applied legal definition," and concluded that "under its usual definition, specific intent is '[t]he intent to accomplish the precise criminal act that one is later charged with.'" App. 22a-23a (citing *Black's Law Dictionary* 822 (9th ed. 2009)).

The Eighth Circuit cited the principle that where Congress uses a term of art, "it presumably knows and adopts the meaning its uses conveys to the judicial mind," and held that Mr. Cherichel therefore "may not obtain relief under the CAT unless he can show that his prospective torturer has the goal or intent of inflicting severe physical or mental pain or suffering upon him." App. 25a-26a. While expressing "no opinion on [Mr.] Cherichel's argument that the BIA's interpretation of specific intent is not entitled to deference," the court settled on the definition of specific intent adopted in *In re J-E-* and in the discredited 2002 OLC Opinion. App. 26a-27a.

The Eighth Circuit acknowledged the 2004 OLC Opinion, but explicitly "decline[d] to adopt its reasoning." App. 32a. The court refused "to be drawn into a debate about how specific intent is defined by other agencies," because "while OLC opinions are generally binding on the Executive branch, the courts are not bound by them." App. 18a, 32a.

A few hours after the Eighth Circuit issued its opinion, an earthquake struck Haiti and devastated Port au Prince. C. Crawford, *Chaos*

Rules in Quake-Ruined City, Daily Telegraph (Aus.), Jan. 15, 2010, at 4. On March 18, 2010, the court granted Mr. Cherichel's motion to stay the mandate, and his stay of removal therefore remains in place. App. 35a.

REASONS FOR GRANTING THE WRIT

Torture, as understood by the Senate in consenting to the CAT, App. 96a, and as stated in the Department of Justice's implementing regulations, App. 101a, requires that a would-be torturer act with specific intent to inflict severe physical or mental pain or suffering.

There is a conflict between two executive branch agencies charged with enforcing the CAT over the meaning of specific intent. The IJ applied the standard articulated in the 2004 OLC Opinion, under which a perpetrator acts with specific intent when he has knowledge that the prohibited result is practically certain to follow. The Eighth Circuit applied the BIA's more narrow definition – requiring purpose in all circumstances – which is the standard set forth in the now-discredited 2002 OLC Opinion.

Moreover, the Eighth Circuit's decision conflicts with prior decisions of this Court, which recognize that a person has specific intent when he acts *either* with purpose to cause a prohibited result, *or* with knowledge that the prohibited result is practically certain to follow from his conduct. The decision also violates the rule of construction that the meaning of words in a statute cannot change with the statute's application, *see Clark*, 543

U.S. at 378, because the BIA applies a more narrow specific intent standard to refoulement under Article 3 of the CAT than the Department of Justice applies to criminal prosecutions under Article 4.

Potential deportees face severe suffering in conditions that have become even worse after the devastating January earthquake, making resolution of this issue both important and timely. This Court's intervention is warranted to ensure that the United States fulfills its obligations under the CAT in all of the circumstances in which the treaty applies.

A. The Eighth Circuit Decided A Substantial Question of Federal Law On Which Two Federal Agencies Are Divided.

1. The United States' obligations under the CAT are not carried out solely by the BIA. Although the BIA enforces the refoulement provision of Article 3 of the CAT, the Department of Justice enforces the criminal prohibitions required by Article 4 of the CAT and implemented through the criminal torture statute, 18 U.S.C. § 2340A. Articles 3 and 4 of the CAT both require the United States to protect individuals against torture, as that term is defined in Article 1. App. 94a, 96a.

The Senate understood that "in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering . . . ." 136 Cong. Rec. S17,491 (1990), App. 96a. This understanding does not

shed any light on what Congress meant by the term "specific intent." The Eighth Circuit acknowledged that the term specific intent "is not always defined or applied consistently," App. 23a, and the 2004 OLC opinion concluded that the term is ambiguous and that courts "do not use it consistently," OLC Op. at 16, App. 137a.

That lack of consistency is evident in the two divergent interpretations of the term within the Executive Branch. The BIA's interpretation, which the Eighth Circuit applied in this case, is that specific intent means "'[t]he intent to accomplish the precise criminal act that one is later charged with.'" App. 23a (citing *Black's Law Dictionary* 822 (9th ed. 2009)).

In contrast, the Office of Legal Counsel has adopted a broader definition. While initially adopting the overly narrow interpretation of specific intent in the now-discredited 2002 Opinion, the Office of Legal Counsel has since concluded that the CAT's specific intent standard could be satisfied where (1) a person deliberately inflicts severe physical or mental pain or suffering on a person, *or* (2) when he "knows that the result is practically certain to follow from his conduct, whatever his desire may be as to that result." 2004 OLC Opinion, at 16 (quoting 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.2a, at 341 (2d ed. 2003)) (emphasis added), App. 138a.

The narrow definition of specific intent followed by the BIA in this case was not

dictated by Congress. To the contrary, the ratification history explains why Congress added this understanding:

> [T]he requirement of intent to cause severe pain and suffering is of particular importance in the case of alleged mental pain and suffering, as well as in cases where *unexpectedly severe physical suffering is caused*. Because specific intent is required, an act that results in *unanticipated and unintended* severity of pain and suffering is not torture for purposes of this Convention.

S. Exec. Rep. 101-30, at 13-14 (Aug. 30, 1990) (emphasis added), App. 97a.

As the Senate Executive Report makes clear, Congress was not drawing a distinction between purpose and knowledge; it was drawing a distinction between pain and suffering that is intentionally inflicted, and pain and suffering that the actor affirmatively thought *would not result* from his actions. *Id.* at 14, App. 97a.

The DOJ regulations implementing the CAT draw the same distinction – "[i]n order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering," but "[a]n act that results in *unanticipated or unintended* severity of pain and suffering is not torture." 8 C.F.R. § 208.18(a)(5) (emphasis added), 101a.

2. In adopting a narrow definition of specific intent, the BIA and the 2002 OLC Opinion improperly relied on a meaning of the term that was not favored at the time Congress drafted the relevant statutes and regulations. The BIA's decision in *In re J-E-*, along with the repudiated 2002 OLC Opinion, relied on the seventh edition of Black's Law Dictionary, which defines specific intent as the "'intent to accomplish the precise criminal act that one is later charged with.'" 23 I. & N. Dec. at 301 (quoting *Black's Law Dictionary* 813-14 (7th ed. 1999)); 2002 OLC Opinion, at 3. The Eighth Circuit cited the ninth edition of Black's Law Dictionary, which contains the same definition. App. 23a (citing *Black's Law Dictionary* 882 (9th ed. 2009)).

At the time the CAT was ratified, however, the sixth edition of Black's Law Dictionary was the most current.[4] Relying on this authority, Congress would have defined specific intent as "[t]he subjective desire *or knowledge* that the prohibited result will occur." *Black's Law Dictionary* 1399 (6th ed. 1990) (emphasis added)); *see also Helling v. McKinney*, 509 U.S. 25, 38 (1993) (Thomas, J., dissenting) (using

[4] The sixth edition of Black's Law Dictionary was published in July 1990, before the Senate added its understanding to the CAT on August 30, 1990. Black's Law Dictionary iv (6th ed. 1990). The seventh edition was not published until June 1999, after DOJ promulgated its regulations implementing the CAT in February 1999. Black's Law Dictionary xv (7th ed. 1999).

dictionaries contemporaneous to enactment of the Eighth Amendment to interpret the meaning of the word "punishment"); *California v. Hodari D.*, 499 U.S. 621, 624 (1991) (same for Fourth Amendment).

The conflicting definitions not only in administrative and judicial decisions but also in primary sources highlight the great uncertainty surrounding this issue. This Court's intervention is warranted to resolve this interpretive dispute.

B. The Eighth Circuit's Interpretation of "Specific Intent" Conflicts With Prior Decisions of This Court.

The Eighth Circuit's interpretation of specific intent improperly narrows the scope of the CAT's specific intent standard. In doing so, the decision conflicts with this Court's precedents in two important respects.

1. This Court has repeatedly held that a specific intent standard is satisfied where the actor either has the purpose of achieving the proscribed result, *or* when he knows that the proscribed result is practically certain to follow from his deliberate conduct.[5]

---

[5] The Eighth Circuit and the 2002 OLC opinion refer to several Supreme Court opinions that purportedly support the narrow interpretation of specific intent. Each is distinguishable. *Carter v. United States*, 530 U.S. 255, 268 (2000), demonstrates only that the distinction between specific intent and general intent is a distinction between *intent* and *no intent*, not a (...continued)

For example, in *Tison v. Arizona*, the Court was asked to decide whether the petitioner acted with specific intent to kill. 481 U.S. 137, 150 (1987). The court concluded that "'one intends certain consequences when he desires that his acts cause those consequences *or knows that those consequences are substantially certain to result from his acts.*'" *Id.* (citation omitted) (emphasis added).

Similarly, in *United States v. U.S. Gypsum Co.*, the Court analyzed a Sherman Act requirement that conditioned liability on a specific intent to restrain trade or monopolize. 438 U.S. 422, 440 (1978). The Court stated, "'[i]t is now generally accepted that a person who acts (or omits to act) intends a result of his act (or omission) under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; *and* (2) *when he knows that the result is practically certain to follow from his conduct, whatever his desire may be as to that result.*'" *Id.* at 445 (citation omitted) (emphasis added).

---

distinction between purpose and knowledge. *United States v. Bailey*, 444 U.S. 394 (1980), states in dicta that purpose aligns with specific intent and knowledge aligns with general intent but concludes in most cases "there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the result." *Id.* at 404, 405. *Ratzlaf v. United States*, 510 U.S. 135 (1994), and *Vacco v. Quill*, 521 U.S. 793 (1997), reference the term "specific intent" but do not construe statutes or regulations containing or applying the term.

In *Screws v. United States*, this Court read a specific intent requirement into a federal civil rights statute to avoid vagueness concerns. 325 U.S. 91, 104 (1945). The Court stated that "[o]ne who . . . act[s] with . . . specific intent is aware that what he does is precisely that which the statute forbids," and this awareness is satisfied when a person acts either "in open defiance or in reckless disregard" of a constitutional requirement. *Id.* at 104-05; *see also United States v. Johnstone*, 107 F.3d 200, 208 (3d. Cir. 1997) ("The *[Screws]* Court reconciles these facially inconsistent standards – that an individual can intend to violate a right even if the individual is not thinking in terms of any right – by recognizing that willfulness includes reckless disregard."); *United States v. Bradley*, 196 F.3d 762, 769 (7th Cir. 1999) (rejecting defendant's argument that specific intent was limited to open defiance of an individual's civil rights, and citing *Screws* for the proposition that reckless disregard for an individual's civil rights is sufficient).

Finally, in *Pettibone v. United States*, the Court construed a federal obstruction of justice statute and determined that the requisite specific intent to violate a statute could exist where the act is a "natural and probable consequence" of the actor's behavior. 148 U.S. 197, 207 (1893). The Fourth Circuit confirmed the continuing vitality of this holding in *United States v. Neiswender*, 590 F.2d 1269 (4th Cir. 1979), a case relied upon in the 2004 OLC Opinion. The Fourth Circuit cited *Pettibone* to

conclude that a defendant "need only have had knowledge or notice . . . of the natural and probable consequences of [the defendant's] acts" to establish specific intent. *Id.* at 1273, 1274 ("*Pettibone* itself acknowledges the propriety of inferring specific intent where the disfavored result naturally flows from a wrongful undertaking.").[6]

2. The Eighth Circuit's refusal to follow the 2004 OLC Opinion creates a disparate application of the CAT across the various contexts in which it applies. This violates the established rule of construction that the meaning of words in a statute cannot change with the statute's application. *See Clark*, 543 U.S. at 378. To allow otherwise would "render every statute a chameleon" and "establish . . . the dangerous principle that judges can give the same statutory text different meanings in different cases." *Id.* at 382, 386. Assigning different meanings to words in a *treaty* depending on the context is even more of a "dangerous principle," because the inconsistency undermines the United States' obligations toward other nations. *See Pierre v.*

---

[6] State courts support the broad meaning of specific intent set forth in this Court's opinions. *See, e.g., State v. Jackoweski*, 915 A.2d 767, 771 (Vt. 2006) ("At common law, crimes committed 'purposely' and those committed 'knowingly' would both have been specific intent offenses.") (internal citations omitted); *State v. Bull*, 512 S.E.2d 177 (W. Va. 1998) (finding specific intent where jury could have found that defendant knew the consequences were substantially certain to result).

Gonzales, 502 F.3d 109, 113, 120 (2d. Cir. 2007) ("[T]he CAT is not solely or predominately concerned with immigration and refoulement . . . . It is unseemly for a government to adopt different meanings of the same word in the same treaty.").

The BIA continues to apply the narrow definition of the CAT's specific intent requirement even though, as the Eighth Circuit acknowledged, App. 32a, OLC opinions are considered "binding on the Department of Justice and other Executive Branch agencies [as they] represent the official position of those arms of government." *Tenaska Washington Partners II, L.P. v. United States*, 34 Fed. Cl. 434, 439 (1995); *see also Electronic Privacy Info. Ctr. v. Dep't of Justice*, 584 F. Supp. 2d 65, 75 (D.D.C. 2008).

The BIA's insistence on following the 2002 OLC Opinion, and the Eighth Circuit's decision upholding the BIA, causes the United States to hold its own interrogators to a higher standard than it holds the Haitian government, even though the CAT requires the United States to protect all individuals against torture, without regard to the nationality of the perpetrator.

C. The Federal Issue Is Important.

The federal issue is important and in need of resolution because of the high stakes for individuals like Mr. Cherichel. How a court defines "specific intent" determines whether an individual may have his removal deferred consistent with the United States' obligations

under the CAT, or whether he will be detained indefinitely in the horrific conditions of a Haitian prison.

Criminal deportees confront brutal and life-endangering conditions so vile that Haitian Justice Minister Paul Denis admitted the country's justice system has committed "extremely serious" human rights violations. Michelle Faul, *Haiti Earthquake Sheds Light on Dismal Prison Conditions*, Deseret Morning News, Mar. 7, 2010 at A18. Most prisoners are detained long after their sentences expired or are held without adequate justification in the first place. *Id.* Criminal deportees like Mr. Cherichel who have no family or friends in Haiti are detained indefinitely in these inhumane conditions. App. 86a.

On January 12, an already intolerable situation became unimaginable as an earthquake devastated the Haitian capital of Port au Prince, killing at least 230,000 people, according to the Haitian government. Faul, *supra*, at A18. Eight of the country's 17 prisons were destroyed or damaged in the earthquake. *Id.* More than 5,000 prisoners fled their cells after the earthquake "and are now being rounded up by Haitian police and returned to a system notorious for appalling conditions and delays." *Id.* The national penitentiary in downtown Port au Prince, which held 4,300 prisoners in a building designed for 800, has now reopened. *Id.*

DHS has temporarily halted deportations to Haiti in the aftermath of the January 12 earthquake. However, the suspension gives no

indication when deportations will resume. DHS, Statement by Deputy Press Secretary Matt Chandler (Jan. 13, 2010), *at* http://www.dhs.gov/ynews/releases/pr_1263409824202.shtm. ("Department of Homeland Security Secretary Janet Napolitano and U.S. Immigration and Customs Enforcement Assistant Secretary John Morton today halted all removals to Haiti for the time being in response to the devastation caused by yesterday's earthquake. ICE continues to closely monitor the situation.").

DHS announced on January 15, 2010, that Haitians who were present in the United States as of January 12 when the Haitian earthquake occurred are entitled to Temporary Protected Status. *See* DHS, Statement from Homeland Security Secretary Janet Napolitano on Temporary Protected Status for Haitian Nationals (Jan. 15, 2010), *at* http://www.dhs.gov/ynews/releases/pr_1263595952516.shtm. However, the very aliens that will be subjected to indefinite detention in inhumane conditions upon return to Haiti are, like Mr. Cherichel, not eligible for Temporary Protected Status because of their felony convictions. *See* 8 U.S.C. § 1254a(c)(2)(B)(i) (alien not eligible for Temporary Protected Status if he "has been convicted of any felony . . . . committed in the United States").

Haiti's detention policy for criminal deportees subjects individuals to severe physical and mental pain and suffering, which is a completely foreseeable consequence of the policy. If the United States is serious about carrying out its

obligations to prevent and punish torture under the CAT, it must hold all perpetrators to the same standard of conduct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JONATHAN L. MARCUS
Counsel of Record
ANN O'CONNELL
PETER SAHARKO
COVINGTON & BURLING LLP
1201 Pennsylvania Ave NW
Washington, DC 20004
(202) 662-6000

April 12, 2010 *Counsel for Petitioner*

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR TLE EIGHTH CIRCUIT

No. 08-3736

SHOODLEY LEE CHERICHEL,

Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General of the United States,

Respondent.

On Petition for Review of the Board of Immigration Appeals

Argued and Submitted: Oct. 21, 2009

Filed: Jan. 12, 2010

Before: MELLOY, SMITH, and SHEPHERD, Circuit Judges.

SHEPHERD, Circuit Judge.

Shoodley Cherichel, a native and citizen of Haiti, petitions for review of a decision of the Board of Immigration Appeals (BIA) denying his application for deferral of removal under the Convention Against Torture (CAT) and ordering him removed to Haiti.

Cherichel argues that the BIA erred in applying a more onerous definition of specific intent under the CAT than was used by the Immigration Judge (IJ). For the following reasons, we deny the petition.

I.

A. Factual Background

Shoodley Cherichel was born in Haiti on November 23, 1979. Although he does not remember coming to the United States, it appears that he entered the United States without inspection sometime between 1982 and 1984. Since that time, Cherichel has never returned to Haiti. He does not speak Creole, Haiti's official language, and understands very little Creole when it is spoken to him. His mother, Meprisena Themistol, is a naturalized U.S. citizen, and he believes his siblings are also U.S. citizens. To his knowledge, Cherichel has no family members currently living in Haiti.

On April 18, 2000, Cherichel pled guilty to possession of marijuana in a Kentucky state court. On January 13, 2005, he was convicted in a Minnesota state court of criminal vehicular homicide and criminal vehicular operation resulting in substantial bodily harm, for which he received and served a 48-month sentence. The Immigration and Naturalization Service (INS)[1] served Cherichel with a Notice to Appear (NTA) on September 3, 2002. The NTA charged that Cherichel was subject to removal for being an alien present in the United States

---

[1] The INS was abolished and its functions assumed by the Department of Homeland Security (DHS) on March 1, 2003.

without being admitted or paroled, in violation of section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(a)(6)(A)(i). Removal proceedings commenced on November 1, 2002. In 2005, DHS also charged Cherichel with removability under INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II), as being an alien who has been convicted of violating a law relating to a controlled substance, based on his Kentucky conviction.[2]

B. Immigration Judge's Decision

Between January 23, 2003, and March 19, 2007, Cherichel had various removal hearings before Immigration Judge Kristin Olmanson.[3] Cherichel asserted three arguments before the IJ: (1) that he should be granted asylum under INA § 208, 8 U.S.C. § 1158; (2) that he was eligible for withholding of removal under INA § 241(b)(3), 8 U.S.C. § 1231; and (3) that his removal should be deferred under Article 3 of the CAT. At his final hearing on March 19, 2007, Cherichel testified that he was afraid to return to Haiti because he has no family there, and that he feared persecution in Haiti based on his "American"

---

[2] DHS also charged that Cherichel was removable under INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I), as being an alien who has been convicted of a crime involving moral turpitude, based on his Minnesota conviction. Both the IJ and the BIA declined to rule on removability on this ground as the other two grounds were sufficient bases for removal.

[3] Cherichel's immigration hearings were continued a number of times during the pendency of his appeal on his Minnesota convictions. Those convictions were upheld by the Minnesota Court of Appeals. *See State v. Cherichel*, No. A05-738, 2006 WL 2529561 (Minn. Ct. App. Sept.5, 2006) (unpublished).

physical characteristics and English-speaking ability. Additionally, Cherichel submitted extensive evidence concerning country and prison conditions in Haiti.

In an opinion dated May 3, 2007, the IJ found Cherichel removable on two of the three grounds charged. Specifically, the IJ found that Cherichel was not eligible for asylum under INA § 208 because he failed to file for asylum within one year of his arrival or within a reasonable period of time after reaching the age of 18, *see* INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B), and that he was not eligible for withholding of removal because his Minnesota convictions constituted particularly serious crimes under the INA, *see* INA § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii). However, the IJ granted Cherichel's application for deferral of removal under the CAT, finding that he had met his burden of proving that, as a criminal deportee, it is more likely than not that he would be tortured if removed to Haiti.[4]

First, the IJ noted that Cherichel provided extensive evidence–42 reports and articles–documenting country conditions in Haiti and the deplorable conditions in Haitian prisons and police stations where uncharged detainees are often held. This included a lack of basic hygiene, lack of food and water, a large number of malnourished prisoners,

---

[4] In doing so, the IJ distinguished the BIA's decision in *In re J E-*, 23 I. & N. Dec. 291 (BIA 2002), *overruled on other grounds by Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir.2004). *See* infra Part II.B.

and severe overcrowding in cells with no toilet or sink. Second, the IJ noted that in the previous five years, prison conditions in Haiti had not improved, but in fact had worsened. Third, criminal deportees who had not broken any Haitian laws were held by authorities despite a 2006 Haitian court ruling prohibiting such detention. Fourth, unless a family member was able to claim responsibility for them, criminal deportees could be detained indefinitely. Fifth, the IJ noted that Cherichel had been in the United States for 25 years and could be identified in Haiti as an "American" because of his physical appearance, mannerisms, and inability to speak Creole. Based on this evidence, the IJ found that it was more likely than not that Cherichel would be tortured if removed to Haiti, and therefore granted Cherichel's application for deferral of removal.

C. BIA Decisions

The BIA granted DHS's appeal from the IJ's decision, vacated the grant of deferral under the CAT, and ordered Cherichel removed to Haiti. *In re Shoodley Lee Cherichel*, File No. A95 204 110 (BIA Sept. 14, 2007). The BIA held that the IJ erred in finding that Cherichel had met his burden of establishing CAT relief. Specifically, although it found no clear error in the IJ's findings regarding abysmal prison conditions in Haiti, the BIA held that those conditions do not "rise[ ] to the level of torture [because] the record does not reflect that Haitian authorities *specifically intend* to inflict severe physical or mental pain or suffering to criminal deportees such as [Cherichel]." *Id.* at 3 (quotation omitted). The BIA also held that "the circumstances presented here are not significantly distinct from

those we considered in [*In re J-E-*, 23 I. & N. Dec. 291 (BIA 2002), *overruled on other grounds by Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004)]." *Id.* at 4.

Cherichel appealed the BIA's decision to this court. In lieu of issuing a formal opinion, we granted the government's motion to remand the case back to the BIA "for reconsideration in light of its scope of review."[5] *Cherichel v. Mukasey*, No. 07-3313, slip op. at 1 (8th Cir. Mar. 26, 2008). On remand, the BIA again ordered Cherichel removed to Haiti. *In re Shoodley Lee Cherichel*, File No. A95 204 110 (BIA Oct. 29, 2008). After holding that no additional fact-finding was required, the BIA reviewed de novo the IJ's findings regarding eligibility for relief under the CAT. *Id.* at 1-2. The BIA held that none of the facts found by the IJ, including those that differentiated Cherichel from the petitioner in *In re J-E-*, "show[ed] that Haitian authorities, in their treatment of criminal deportees, specifically intend to inflict torture." *Id.* at 2. Therefore, the BIA held that Cherichel had failed to meet his burden of proof under the CAT and ordered him removed to Haiti.

II.

Cherichel appeals, arguing that the BIA applied an incorrect definition of specific intent to the CAT's

---

[5] On remand, the BIA "specifically address[ed] the issue of whether Haitian authorities did not specifically intend to inflict severe physical or mental pain or suffering to criminal deportees . . . in light of the factfindings made by the immigration judge." *In re Shoodley Lee Cherichel*, File No. A95 204 110, at 1 (BIA Oct. 29, 2008) (quotation omitted).

intent requirement. In deciding the correct legal definition to apply, we first review the history and codification of the CAT, as well as how the CAT and its implementing regulations have been subsequently interpreted.

A. History of the CAT

The ratification history of the CAT and its subsequent enactment into domestic law have been thoroughly examined. *See Auguste v. Ridge*, 395 F.3d 123, 129-34 (3d Cir. 2005); *In re J-E-*, 23 I. & N. Dec. at 294-99; *see generally* J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988). While we see no need to repeat that examination here, some discussion of the history of the CAT is necessary to our analysis.

The CAT was adopted by the United Nations General Assembly on December 10, 1984.[6] *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85. It has as its stated purpose "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world." *Id.* pmbl. To

---

[6] The CAT built on previous international agreements seeking to expand human rights and curtail the use of torture around the world, including the Universal Declaration of Human Rights of 1948 and the Geneva Conventions of 1949. *See* Burgers & Danelius, *supra*, at 5-30.

accomplish this goal, Article 2 of the CAT requires "[e]ach State Party [to] take effective legislative, administrative, judicial or other measures to prevent such acts of torture in any territory under its jurisdiction." *Id.* Art. 2(1). Additionally, Article 3 provides that "[n]o State Party shall expel, return ('*refouler* ') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." *Id.* Art. 3(1). The CAT defines torture as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, whether such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incident to lawful sanctions.
>
> *Id.* Art. 1(1).

President Reagan signed the CAT on April 18, 1988, and sent it to the Senate for advice and consent on May 20, 1988. *Id.* at iii. Importantly, President Reagan (and later President George H.W. Bush) proposed, and the Senate eventually adopted,

a number of reservations, understandings, and declarations pertaining to the CAT, two of which are relevant to this case. First, with respect to the definition of torture under Article 1, President Bush proposed the understanding that "in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering." S. Exec. Rep. 101-30, at 9, 36 (1990). Second, President Bush proposed that "[t]he United States understands the phrase 'where there are substantial grounds for believing that he would be in danger of being subjected to torture' as used in Article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured.'" *Id.* at 16.

Although the CAT had been signed by the President and ratified by the Senate, it was not self-executing, "which means there is no direct right of action for violation of the treaty, only for violation of any domestic law implementing the treaty." *Raffington v. Cangemi*, 399 F.3d 900, 903 (8th Cir. 2005); *see also Auguste*, 395 F.3d at 132 n. 7 (citing cases). Congress implemented the CAT with the passage of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, Div. G, Title XXII, § 2242, 112 Stat. 2681, 2681-822 (codified as note to 8 U.S.C. § 1231).[7]

---

[7] As the Third Circuit has repeatedly noted, because there is no direct right of action for violation of the CAT, only for violation of FARRA, Cherichel's claim is technically a FARRA claim. *See Pierre v. Att'y Gen.*, 528 F.3d 180, 186 n. 5 (3d Cir.2008) (en banc); *Auguste v. Ridge*, 395 F.3d 123, 133 n. 7 (3d Cir.2005); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 221 n. 24 (3d Cir.2003). However, because the pertinent provisions of FARRA and the CAT are substantively identical, this distinction is

(continued...)

The first section of FARRA states that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture." *Id.* To achieve this goal, FARRA directs "the heads of the appropriate agencies [to] prescribe regulations to implement the obligations of the United States under Article 3 of the [CAT], subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention." *Id.*

Pursuant to FARRA, the Department of Justice (DOJ) promulgated regulations setting forth the procedures under which a person could seek relief under the CAT. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999) (codified at 8 C.F.R. §§ 208.16(c)-.18(a) (2004)). Section 208.18(a) defines the terms to be used in applying the United States' obligations under the CAT, which "incorporate the definition of torture contained in Article 1 of the [CAT], subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention." 8 C.F.R. § 208.18(a). Instead of enumerating acts that could constitute torture, § 208.18(a) combines the Senate's

---

(footnote continued)

inconsequential, and we will continue to refer to Cherichel's claim as a CAT claim.

understandings with Article 1 of the CAT to formulate a basic, general definition of torture:

> (1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.
>
> (2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.
>
> (3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. . . .
>
> . . . .
>
> (5) In order to constitute torture, an act must be *specifically intended* to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

. . . .

> (7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

Id. (emphasis added). The regulations also import the "more likely than not" standard for proving torture that was contained in both the President's and Senate's understandings of the CAT. *See* 8 C.F.R. § 208.16(c)(2). Once a petitioner has met this standard, withholding of removal or deferral of removal is mandatory.[8] 8 C.F.R. §§ 208.16(c)(4), 208.17(a).

Thus, all three important documents–the United States' understandings of the CAT, the law giving the CAT domestic effect, and the regulations implementing that effect in the immigration context–incorporate the understandings of the President and the Senate that, in order to constitute torture, an act must be specifically intended to inflict severe pain or suffering.

---

[8] Although eligibility for withholding of removal and deferral of removal under the CAT are addressed in different sections of the regulations, the "more likely than not" standard is used for each. *See*8 C.F.R. §§ 208.16(c)(4) (withholding of removal), 208.17(a) (deferral of removal).

B. *In re J-E-*

In 2002, the BIA considered the issue of whether "indefinite detention, inhuman prison conditions, and police mistreatment . . . constitute torturous acts" under the CAT. *In re J-E-*, 23 I. & N. Dec. at 292. There, a native and citizen of Haiti who had resided in the United States for approximately ten years and had been convicted of the sale of cocaine in Florida, was ordered removed to Haiti. *Id.* at 292-93. At his removal hearing, the petitioner introduced evidence showing that if he were removed to Haiti, he would be detained under deplorable conditions.[9] *Id.* at 293. Those conditions included "prison facilities [that] are overcrowded and inadequate [,]" where prisoners, many of whom are malnourished, "are deprived of adequate food, water, medical care, sanitation, and exercise." *Id.* At the conclusion of the hearing, the IJ nevertheless found the petitioner ineligible for CAT relief. *Id.*

On appeal, the BIA began its analysis with an examination of the ratification history of the CAT and its implementing regulations. *Id.* at 294-99. After noting that the regulatory definition of torture in 8 C.F.R. § 208.18(a) governed its decision, the BIA summarized that definition to develop a test for CAT claims: "For an act to constitute torture it must be: (1) an act causing severe physical or mental pain or

---

[9] This evidence included the Department of State's 2001 Background Note on Haiti, five newspaper articles addressing Haitian prison conditions, "a set of photographs of malnourished, dying Haitian inmates," and a letter from a Department of State official. *In re J-E-*, 23 I. & N. Dec. at 293.

suffering; (2) intentionally inflicted; (3) for a proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official . . . ; and (5) not arising from lawful sanctions." *Id.* at 297. In discussing the level of intent required, the BIA noted that "an act that results in unanticipated or unintended severity of pain or suffering does not constitute torture." *Id.* at 298.

The BIA then turned to the question of whether any of the specific state actions alleged by the petitioner–indefinite detention, inhuman prison conditions, and police mistreatment–constituted torture within the meaning of the regulations. *Id.* at 299. Examining first the petitioner's claim that he would be indefinitely detained by Haitian authorities, the BIA found it "undisputed that the respondent will be subject to detention of an indeterminate length on his return to Haiti." *Id.* This detention of criminal deportees is designed by the Haitian government as a deterrent, "to prevent the 'bandits' from increasing the level of insecurity and crime in the country." *Id.* at 300 (quotation omitted). As such, the BIA found that the detention of criminal deportees did not constitute torture, because it is "a lawful enforcement sanction designed . . . to protect the populace from criminal acts committed by Haitians who are forced to return to the country after having been convicted of crimes abroad." *Id.*

Turning next to the petitioner's claim that indefinite detention, coupled with inhuman prison conditions, amounted to torture, the BIA noted that an "act must be *specifically intended* to inflict severe pain or suffering" in order to constitute torture. *Id.*

The BIA found this to be a "specific intent" requirement, not a "general intent" requirement. *Id.* at 300-01. Citing the legal definition of specific intent,[10] the BIA found that Haitian authorities did not have the specific intent to inflict severe pain or suffering when they imprisoned criminal deportees in harsh conditions because "there is no evidence that they are intentionally and deliberately creating and maintaining such prison conditions in order to inflict torture." *Id.* at 301. Instead, the harsh conditions "are the result of budgetary and management problems as well as the country's severe economic difficulties." *Id.* As such, the detention of criminal deportees did not amount to torture, despite the fact that "Haitian authorities are intentionally detaining criminal deportees knowing that the detention facilities are substandard." *Id.*

Finally, in addressing the petitioner's claim that physical mistreatment by Haitian authorities would amount to torture,[11] the BIA held that the evidence showed only "isolated instances of mistreatment in

[10] "'Specific intent' is defined as the 'intent to accomplish the precise criminal act that one is later charged with' while 'general intent' commonly 'takes the form of recklessness . . . or negligence.'" *Id.* at 301 (alteration in original) *(quoting Black's Law Dictionary* 813-14 (7th ed.1999)).

[11] There was little doubt that the petitioner would be physically mistreated in some way if returned to Haiti. *See id.* at 301-02. The only question was whether that mistreatment would rise to the level of torture. *See id.* at 302 ("Instances of police brutality do not necessarily rise to the level of torture, whereas deliberate vicious acts such as burning with cigarettes, choking, hooding, kalot marassa [severe boxing of the ears], and electric shock may constitute acts of torture.").

Haitian prisons that rise to the level of torture." *Id.* at 302. This was insufficient to meet the petitioner's burden of proof of showing that it was more likely than not that he would be tortured. *Id.* at 303. Based on the foregoing findings, the BIA dismissed the appeal. *Id.* at 304.

III.

Cherichel argues that the BIA erred as a matter of law by applying the incorrect definition of specific intent to the CAT's intent requirement. According to Cherichel, the CAT's intent requirement is satisfied if severe physical or mental pain or suffering is merely the foreseeable consequence of a deliberate act. Cherichel argues that this "foreseeability" standard was adopted by the IJ and is consistent with Eighth Circuit case law. He also argues that the more onerous "specific intent" standard applied by the BIA causes the United States to hold the Haitian government to a lower standard than the United States holds its own interrogators. Finally, Cherichel contends that even under the more onerous specific intent standard adopted by the BIA, he is entitled to CAT relief because it is more likely than not that he will be tortured if returned to Haiti. We address these arguments seriatim.

A. Standard of Review

Because Cherichel was ordered removed based in part on his Kentucky conviction for possession of marijuana, his removal implicates 8 U.S.C. § 1252(a)(2)(C), which purports to eliminate from appellate jurisdiction "any final order of removal against an alien who is removable by reason of having committed a criminal offense" involving

controlled substances or crimes of moral turpitude. Section 1252(a)(2)(D), however, restores appellate jurisdiction to review such removal orders but limits review to "constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(D). Because defining the correct legal standard of specific intent to apply to the CAT's intent requirement is a question of law, we retain jurisdiction over Cherichel's appeal pursuant to 8 U.S.C. § 1252(a)(2)(D).

"'We review questions of law de novo and accord substantial deference to the BIA's interpretation of immigration law and agency regulations.'" *Kim v. Holder*, 560 F.3d 833, 836 (8th Cir.), *cert. denied*, 130 S.Ct. 393 (2009) (*quoting Arellano-Garcia v. Gonzales*, 429 F.3d 1183, 1185 (8th Cir. 2005)). Thus, because the regulations implementing the CAT are immigration regulations within the purview of the BIA, the BIA's interpretation of those regulations should generally be accorded substantial deference. *See Malonga v. Mukasey*, 546 F.3d 546, 553 (8th Cir. 2008); *see also Pierre v. Gonzales*, 502 F.3d 109, 116 (2d Cir. 2007) ("As to the CAT regulations: where the BIA interprets a regulation promulgated by the Attorney General under the INA, we afford substantial deference to the BIA's interpretation, unless it is plainly erroneous or inconsistent with the regulation, or inconsistent with the agency's previous interpretation." (quotations omitted)). This deference "may be qualified to the extent that [the BIA's] reading of the regulation . . . is a reading of terms that have application outside the context of immigration." *Pierre*, 502 F.3d at

114.[12] Factual determinations made by the IJ are outside the scope of our review "unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B).

B. Precedent

The specific issue before the court concerns the degree of intent Cherichel's future captors must have in order for Cherichel to be able to obtain CAT relief. In *In re J-E-*, the BIA held that, in the context of criminal deportees being return to Haiti, petitioners must prove that Haitian authorities specifically intend to torture; that is, that they "intentionally and deliberately creat[e] and maintain[ ] [abysmal] prison conditions in order to inflict" severe physical or mental pain or suffering. 23 I. & N. Dec. at 300-01. This decision has commanded deference from several circuits. *See, e.g., Elien v. Ashcroft*, 364 F.3d 392, 398-99 (1st Cir. 2004); *Pierre*, 502 F.3d at 119 (2d Cir.); *Pierre v. Att'y Gen.*, 528 F.3d 180, 189 (3d Cir. 2008) (en banc); *Auguste*, 395 F.3d at 153(Third Circuit); *Villegas v. Mukasey*, 523 F.3d 984, 988 (9th Cir. 2008); *Cadet v. Bulger*, 377 F.3d 1173, 1190, 1193, 1195 (11th Cir. 2004). Indeed, "[n]o federal circuit court considering the case of a Haitian

[12] Cherichel argues that, because the CAT's definition of torture is interpreted and administered by multiple federal agencies, the BIA's definition of specific intent under the CAT is not entitled to any deference at all. We see no need to be drawn into a debate about how specific intent is defined by other agencies or in other contexts, or to articulate the precise level of deference to be shown the BIA in this case. As will be discussed below, we believe that the standard clearly expressed in the ratification history of the CAT compels the resolution of this case.

criminal deportee has declined to follow *In re J-E-*[.]" *Pierre*, 502 F.3d at 117; *see also Villegas*, 523 F.3d at 988 ("Every other circuit to consider the question has concluded that 'torture' under the CAT requires specific intent to inflict harm.").[13]

In its thorough opinion in *Auguste*, the Third Circuit rejected a Haitian national's argument that indefinite detention under deplorable conditions amounted to torture. 395 F.3d at 152-54. Relying on the CAT's ratification history, the court found that the CAT contained a specific intent requirement, and that this requirement was carried into domestic law by the CAT's implementing regulations. *Id.* at 142. The court went on to affirm the BIA's adoption of a definition of specific intent that was "in accord with [the term's] ordinary meaning in American law." *Id.* at 145. The court noted that the Supreme Court has held that, in order to act with specific intent, an actor "must expressly intend to achieve the forbidden act." *Id. (citing Carter v. United States*, 530 U.S. 255, 269 (2000)). In the context of the CAT, this means a prospective torturer must have "the intent to commit the [torturous] act as well as the intent to achieve the consequences of the act, namely the infliction of the severe pain and suffering." *Id.* at 145-46. A showing that severe pain and suffering is

---

[13] Although the *Pierre* court noted that "there are wrinkles in the Third Circuit," 502 F.3d at 117 & n. 3 (*citing Lavira v. Att'y Gen. of the U.S.*, 478 F.3d 158 (3d Cir.2007)), those "wrinkles" have since been resolved in favor of the BIA's position. *See Pierre*, 528 F.3d at 190 ("Moreover, to the extent that *Lavira* suggests that mere knowledge is sufficient for a showing of specific intent, we overrule that suggestion.").

foreseeable, but not intended, was held to be insufficient to establish specific intent. *Id.* at 146.

This formulation of the CAT's specific intent requirement was affirmed en banc by the Third Circuit in *Pierre*, 528 F.3d at 189. There, the petitioner did not dispute that the CAT contained a specific intent requirement. *Id.* Rather, the petitioner argued that the requirement was "satisfied by a showing that the Haitian officials have knowledge that severe pain or suffering is the practically certain outcome of his imprisonment." *Id.* The court disagreed, and affirmed the *Auguste* court's definition of specific intent as including "the intent to commit the act as well as the intent to achieve the consequences of the act." *Id.* (*quoting Auguste*, 395 F.3d at 145-46). The court elaborated:

> Specific intent requires not simply the general intent to accomplish an act with no particular end in mind, but the additional deliberate and conscious purpose of accomplishing a specific and prohibited result. Mere knowledge that a result is substantially certain to follow from one's actions is not sufficient to form the specific intent to torture. Knowledge that pain and suffering will be the certain outcome of conduct may be sufficient for a finding of general intent but it is not enough for a finding of specific intent.

Id.

Similarly, the Second Circuit has rejected an argument that "Haiti's indefinite detention of

criminal deportees amounts to torture in light of the prevailing prison conditions," *Pierre*, 502 F.3d at 116, holding that the CAT's specific intent requirement "incorporates a criminal specific intent standard," *id.* at 118. This standard "requires that the actor intend the actual consequences of his conduct (as distinguished from the act that causes these consequences)." *Id.* The court declined to hold that specific intent can be established through "willful blindness" or "deliberate indifference," noting that those "concepts, which may bear on knowledge to the extent they establish conscious avoidance, [cannot] without more demonstrate specific intent." *Id.* In distinguishing the CAT's specific intent requirement from a general intent requirement, the court noted that "[t]he President and Senate knew full well that they were construing a treaty designed to stop criminal conduct. We cannot ignore the word 'specifically' in the ratification understanding and the regulations, and we decline to give it a counter-intuitive spin." *Id.* (footnote omitted).

C. Analysis

Our own analysis begins with the language of the CAT itself. Article 1 defines torture as "any act by which severe pain or suffering, whether physical or mental, is *intentionally* inflicted on a person" for a proscribed purpose. Art. 1(1), S. Treaty Doc. No. 100-20 (emphasis added). The understandings of this definition, articulated by both the President and the Senate, make clear that the "intentionally inflicted" requirement means "an act must be *specifically intended* to inflict severe physical or mental pain or suffering" to qualify as torture. S. Exec. Rep. No. 101-30, at 9, 36 (emphasis added).

"Thus, we are presented with a situation where both the President and the Senate, the two institutions of the federal government with constitutional roles in the treaty-making process, agreed during the ratification stage that their understanding of the definition of torture contained in Article 1 of the [CAT] included a specific intent requirement." *Auguste*, 395 F.3d at 142. These understandings were carried into the domestic realm through FARRA and 8 C.F.R. § 208.18(a), which incorporate the CAT's definition of torture subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention. *See* FARRA § 2242; 8 C.F.R. § 208.18(a). Given such clear evidence, we find it beyond dispute that the CAT and its implementing regulations include a specific intent requirement. *See also* Restatement (Third) of the Foreign Relations Law of the United States § 314 cmt. d (1987) ("A treaty that is ratified or acceded to by the United States with a statement of understanding becomes effective in domestic law . . . subject to that understanding.").

We next turn to the substantive question of what this specific intent requirement means in the CAT context, and whether the BIA erred in defining specific intent with reference to its ordinary meaning in American law. Cherichel acknowledges that the CAT contains a specific intent requirement, but argues that it is satisfied if severe physical or mental pain or suffering is the foreseeable consequence of a deliberate act.

Specific intent is a term of art in American jurisprudence, well known to practitioners and law

students alike. *See Auguste*, 395 F.3d at 145; *United States v. Sawyer*, 239 F.3d 31, 40 n. 7 (1st Cir. 2001). Although the term is not always defined or applied consistently, *see* Joshua Dressler, *Understanding Criminal Law* § 10.06 (4th ed. 2006); 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.2(e) (2d ed. 2003), under its usual definition, specific intent is "[t]he intent to accomplish the precise criminal act that one is later charged with," *Black's Law Dictionary* 882 (9th ed. 2009). This definition is used throughout criminal law. *See, e.g., Carter*, 530 U.S. at 269 (noting that specific intent requires an intent to achieve the prohibited act); *Vacco v. Quill*, 521 U.S. 793, 802-03 (1997) ("[T]he law distinguishes actions taken 'because of' a given end from actions taken 'in spite of' their unintended but foreseen consequences." (*quoting Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979))); *United States v. Bartlett*, 856 F.2d 1071, 1078 n. 9 (8th Cir. 1988) (quoting jury instructions that "[t]o establish specific intent the Government must prove that the Defendant knowingly did an act which the law forbids, purposefully intending to violate the law"); 21 Am.Jur.2d *Criminal Law* § 119 (2008) (providing that specific intent "requires not simply the general intent to do the immediate act with no particular . . . end in mind, but the additional deliberate and conscious purpose or design of accomplishing a very specific and more remote result; mere knowledge that a result is substantially certain to follow from one's actions is not the same as the specific intent or desire to achieve that result"). This definition has been adopted by every circuit to address the issue of specific intent in the context of Haitian criminal

deportees seeking CAT relief. *See Villegas*, 523 F.3d at 988.

In contrast, general intent is "intent to perform an act even though the actor does not desire the consequences that result[,]" and often "takes the form of recklessness . . . or negligence." *Black's Law Dictionary*, *supra*, at 882; *see also* LaFave, *supra*, § 5.2(e), at 355 ("[G]eneral intent is only the intention to make the bodily movement which constitutes the act which the crime requires." (quotation omitted)); 21 Am.Jur.2d *Criminal Law* § 118. The two forms of intent are often contrasted against one another. For example, the Supreme Court has noted that " 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent." *United States v. Bailey*, 444 U.S. 394, 405 (1980). The *Carter* Court used an example to help distinguish between general and specific intent:

> [A] person entered a bank and took money from a teller at gunpoint, but deliberately failed to make a quick getaway from the bank in the hope of being arrested so that he would be returned to prison and treated for alcoholism. Though this defendant knowingly engaged in the acts of using force and taking money (satisfying "general intent"), he did not intend permanently to deprive the bank of its possession of the money (failing to satisfy "specific intent").

Carter, 530 U.S. at 268 (*citing United States v. Lewis*, 628 F.2d 1276, 1279 (10th Cir. 1980)).

It is this definition of specific intent–where the actor must intend both the prohibited act and its prohibited consequences–that the BIA properly applied both in this case and in *In re J-E-*. Specific intent is a term of art with a well-known, oft-applied legal definition. The D.C. Circuit has eloquently noted that "[w]here Congress borrows a term of art in which is accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the meaning its uses conveys to the judicial mind, and in such a case, in the absence of a contrary direction, its use may be taken as satisfaction with widely accepted definitions and not a departure from them." *United States v. Bailey*, 585 F.2d 1087, 1124 (D.C. Cir. 1978), *rev'd on other grounds*, 444 U.S. 394 (1980) (*citing Morissette v. United States*, 342 U.S. 246 (1952)); *see also Refling v. Burnet*, 47 F.2d 859, 861 (8th Cir. 1931) (" 'Where words have acquired a well-understood meaning by judicial interpretation, it is to be presumed that they are used in that sense in a subsequent statute, unless the contrary clearly appears.' " (*quoting United States v. Trans-Missouri Freight Ass'n*, 58 F. 58, 67 (8th Cir. 1893))). We believe the same principle applies when interpreting regulations that incorporate the understandings of both the President and the Senate.

Therefore, we hold that the phrase "specifically intended" contains a specific intent standard, as that standard is used in American criminal law. This means that a petitioner may not obtain relief under the CAT unless he can show that his prospective

torturer has the goal or intent of inflicting severe physical or mental pain or suffering upon him.[14] We reject the argument that a showing that pain or suffering is practically certain to occur can establish specific intent; that is not the law. As the *Pierre* court noted: "We cannot ignore the word 'specifically' in the ratification understanding and the regulations, and we decline to give it a counter-intuitive spin." 502 F.3d at 118. We also cannot ignore the phrase "specifically intended" in the CAT's implementing regulations, and we give it its ordinary meaning in American law.

Our reading of the plain language of the CAT and its implementing regulations is not based on, but is confirmed by, the BIA's interpretation in *In re J-E-*. *See Pierre*, 502 F.3d at 119 ("The deference we owe to the BIA's analysis in *In re J-E-* simply confirms the understanding we derive from plain meaning."). In *In re J-E-*, the BIA engaged in the same analysis in which we have engaged here and simply applied the traditional meaning of "specific intent" to the CAT context. *See* 23 I. & N. Dec. at 301. Because we

---

[14] We are quick to note, however, that the element of specific intent is separate and distinguishable from the element of state acquiescence. The definition of torture in 8 C.F.R. § 208.18(a) makes clear that it is the *torturer* who must possess the specific intent to inflict severe physical or mental pain or suffering, not necessarily the state actor. Thus, where a private actor specifically intends to inflict such pain or suffering, a showing that "a government official is aware of the persecutor's conduct and intent and acquiesces in violation of the official's duty to intervene" can be sufficient to constitute torture under the CAT. *Pierre*, 502 F.3d at 118 (*citing Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir.2004)); *see also*8 C.F.R. § 208.18(a)(7).

derive our holding from the plain language of the regulations, we express no opinion on Cherichel's argument that the BIA's interpretation of specific intent is not entitled to deference.[15]

Cherichel relies heavily upon our decision in *Habtemicael v. Ashcroft*, 370 F.3d 774 (8th Cir. 2004), for the proposition that, in the CAT context, the specific intent element is satisfied by a showing that severe physical or mental pain or suffering is the foreseeable consequence of a deliberate act. In *Habtemicael*, an Ethiopian national who had been conscripted for service in the Eritrean liberation movement sought asylum, withholding of removal, and protection under the CAT. *Id.* at 777. Habtemicael's CAT claim was based on his fear that if returned to Eritrea, "the government would persecute or torture him because of his ideological opposition to the [Eritrean People's Liberation Front], his escape [from an EPLF camp] in 1986 [during which two EPLF soldiers were killed], and his failure to make the payments required for expatriates to have an Eritrean identity card." *Id.* at

[15] However, a number of courts have deferred to the BIA's interpretation of specific intent when examining the CAT and its implementing regulations. *See, e.g., Pierre*, 502 F.3d at 116 (noting that, because the CAT's implementing regulations were drawn by the DOJ pursuant to FARRA and incorporate the Senate's understandings, "this circumstance bespeaks more deference, not less: deference to the Senate's ratification understanding, deference to the framing of the regulations, and deference to an agency's interpretation of the regulations"); *see also Auguste*, 395 F.3d at 144-45 (discussing the amount of deference owed to "the BIA's interpretation of the specific intent standard").

778. Following a hearing, the IJ found that any punishment Habtemicael received if returned to Eritrea, including the death penalty, would be incidental to lawful sanctions and thus not torture under the CAT because "a government has authority to punish and even execute individuals who avoid conscription or desert military forces during wartime." *Id.* at 779. The BIA affirmed without opinion, and Habtemicael appealed. *Id.*

On appeal, we reversed the IJ's ruling on Habtemicael's CAT claim and "remand [ed] for further findings as to whether Habtemicael is more likely than not to suffer torture within the meaning of the Convention if returned to Eritrea." *Id.* at 783. We based this reversal on the IJ's failure to make "findings as to whether the EPLF had the status of a recognized government when Habtemicael was forced into its service." *Id.* at 781. If it did not, "then Habtemicael as a citizen of Ethiopia may have acted lawfully in escaping and defending himself against recapture," and "[t]he sanction of death might therefore be a violation of the [CAT]." *Id.* We then briefly discussed what Habtemicael would have to prove on remand before the IJ and stated that the "intent requirement [of the CAT] is satisfied if prolonged mental pain or suffering either is purposefully inflicted or is *the foreseeable consequence of a deliberate act*." *Id.* at 782 (emphasis added) (*citing Zubeda v. Ashcroft*, 333 F.3d 463, 473 (3d Cir. 2003)).[16]

[16] In *Zubeda v. Ashcroft*, the BIA had denied the petition of a citizen of the Democratic Republic of Congo requesting asylum, (continued...)

Unsurprisingly, Cherichel seizes on this statement, arguing that in the Eighth Circuit–in contrast to every other circuit that has examined the issue–the CAT's specific intent requirement is satisfied by a showing that severe pain or suffering is merely foreseeable or "practically certain to follow from the actor's conduct, whatever his desire may be as to the result." (Pet'r Br. 11 (emphasis omitted).) We recognize that the language in *Habtemicael* is in conflict with our holding here that the CAT's specific intent standard can only be satisfied by proving that a persecutor has the goal or intent of inflicting severe physical or mental pain or suffering. However, we believe this portion of the *Habtemicael* decision to be dicta, and we decline to follow it. *See Passmore v. Astrue*, 533 F.3d 658, 661 (8th Cir. 2008) (noting that the court need not follow dicta, defined as "a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential" (quotation omitted)).

Our decision in *Habtemicael* was based on the IJ's failure to address the factual question of whether the EPLF had sovereign authority in 1986 such that any punishment that Habtemicael might receive upon returning to Eritrea would be a lawful sanction. *See*

(footnote continued)

withholding of deportation, and relief under Article 3 of the CAT. 333 F.3d 463, 465-66 (3d Cir.2003). In vacating the BIA's decision and remanding to the IJ, the court stated that "[a]lthough the regulations require that severe pain or suffering be 'intentionally inflicted,' we do not interpret this as a 'specific intent' requirement." *Id.* at 473 (internal citation omitted).

370 F.3d at 781 ("The immigration judge made no findings as to whether the EPLF had the status of a recognized government when Habtemicael was forced into its service in Barentu or whether it had the authority to impress an Ethiopian citizen into military service against the Ethiopian government."). Such factual issues are not for this court to resolve. *Id.* ("[T]he extent of [the EPLF's] authority in 1985 and 1986 is a question for the immigration judge in the first instance, as is any legal consequence."). Thus, we remanded the case to the IJ for further fact-finding. *Id.* at 783. Our discussion of what Habtemicael would have to prove on remand was unnecessary to our resolution of the case, and no other panel of this court, or any other court, has relied upon it. Thus, we hold that the portion of *Habtemicael* discussing specific intent is dicta, and therefore not entitled to precedential effect. *See Passmore*, 533 F.3d at 661.

Additionally, we note that the language in *Zubeda*, upon which the *Habtemicael* court relied, has since been held to be dicta as well. *See Auguste*, 395 F.3d at 148 ("[W]e believe that the quoted passage of *Zubeda*, upon which Auguste relies, is dicta."); *see also Pierre*, 528 F.3d at 187 (acknowledging same). A similar fate has befallen *Lavira v. Attorney General*, 478 F.3d 158 (3d Cir. 2007). In *Lavira*, the court stated that it could not "rule out that intent can be proven through evidence of willful blindness." *Id.* at 171. The Third Circuit, sitting en banc, has since overruled this interpretation of specific intent. *See Pierre*, 528 F.3d at 190 ("[T]o the extent that *Lavira* suggests that

mere knowledge is sufficient for a showing of specific intent, we overrule that suggestion.").

Cherichel also relies upon a 2004 memorandum by the DOJ's Office of Legal Counsel (OLC) to support his argument that specific intent can be established by mere foreseeability. *See* Mem. from Daniel Levin, Acting Assistant Att'y Gen., to James B. Comey, Deputy Att'y Gen. (Dec. 20, 2004), *available at* http:// www. justice. gov/ olc/ 18 usc 23402340 a 2. htm [hereinafter 2004 OLC Memorandum]. The memorandum analyzes the legal standards applicable under 18 U.S.C. §§ 2340-2340A, which fulfill the United States' obligation under the CAT by criminalizing torture, defined as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering." 18 U.S.C. § 2340(1). The memorandum addresses several issues, including the meaning of the terms "severe," "severe physical pain or suffering," and "severe mental pain or suffering." 2004 OLC Memorandum. Its final section discusses the meaning of "specifically intended," as used in the definition of torture in § 2340(1). *Id.* After noting inconsistencies in the way courts have interpreted general and specific intent, the memorandum finds that it is "not . . . useful to try to define the precise meaning of 'specific intent' in section 2340." *Id.* Citing "the President's directive that the United States not engage in torture," the memorandum suggests that "it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture." *Id.* The memorandum specifically declines to reiterate

the standard of specific intent previously articulated by the OLC, namely that the "infliction of severe pain or suffering be the defendant's 'precise objective.'" *Id.* n. 27.

Cherichel argues that because the OLC suggests that, in the domestic context, specific intent can be proven by showing that severe pain or suffering was the foreseeable consequence of a deliberate act, we must apply a similar definition in the immigration context. By failing to do so, Cherichel claims that "the United States is holding its own interrogators to a higher standard than it holds the Haitian government in its treatment of criminal deportees." (Petr.'s Br. 19.)

Without expressing an opinion as to the amount of weight or deference due the 2004 OLC Memorandum,[17] we decline to adopt its reasoning. Our holding –that the CAT's specific intent element cannot be satisfied by a showing that severe physical or mental pain or suffering is merely foreseeable–is based on the plain language of the CAT, the understandings of the CAT expressed by the President and the Senate, and the language of the CAT's implementing regulations. That the OLC interprets the CAT's language differently, while perhaps relevant to our analysis, is certainly not determinative.

[17] We note, however, that while OLC opinions are generally binding on the Executive branch, *see Public Citizen v. Burke*, 655 F. Supp. 318, 321-22 (D.D.C.1987), the courts are not bound by them, *see id.*

In sum, we reject the argument that the CAT's specific intent element can be satisfied by a showing that severe physical or mental pain or suffering is merely the foreseeable consequence of a deliberate action. We hold that the definition of torture under the CAT and its implementing regulations contains a specific intent element, which is satisfied only by a showing that a persecutor specifically intends to inflict severe pain or suffering upon his victim.[18] This was the definition properly applied by the BIA in this case.

IV.

Having determined that the BIA applied the correct legal definition of specific intent, we must affirm the BIA's decision. Because Cherichel was ordered removed as having committed a drug offense, our jurisdiction is limited to constitutional issues and questions of law. 8 U.S.C. § 1252(a)(2)(C), (D). Factual determinations lie outside our scope of review and, to the extent that Cherichel argues that the BIA incorrectly held that he failed to prove specific intent under the standard announced today, we lack the jurisdiction to reweigh the evidence before the BIA. *See* 8 U.S.C. § 1252(a)(2)(D); *see also Lovan v. Holder*, 574 F.3d 990, 998 (8th Cir. 2009)

[18] We note that we are not holding that deplorable prison conditions can never constitute torture or that an alien can never receive CAT protection based solely on evidence of such conditions. Where a petitioner can prove that authorities place prisoners in deplorable conditions with the specific intent to inflict severe physical or mental pain or suffering, such actions can rise to the level of torture if the other requirements of the CAT are satisfied.

(holding that a challenge to the BIA's factual determinations is beyond our jurisdiction); *Mocevic v. Mukasey*, 529 F.3d 814, 817 (8th Cir. 2008) (per curiam) (declining to review petitioner's claims for asylum, withholding of removal, and CAT relief because the petition amounted to "nothing more than a challenge to the IJ's discretionary and fact-finding exercises cloaked as a question of law") (quotations omitted). Because Cherichel failed to prove that Haitian authorities have the specific intent to inflict severe pain or suffering when imprisoning criminal deportees, he cannot prove that it is more likely than not that he will be tortured if returned to Haiti.

Nothing in our holding today is meant to minimize the deplorable, often inhuman conditions that exist in many Haitian prisons and police stations. The evidence adduced by Cherichel before the IJ shows that Haitian prisoners and criminal deportees are held in squalid, overcrowded cells without adequate food, water, sanitation, exercise, or medical treatment. "[D]etainees and other prisoners face a brutal existence, experiencing pain and suffering on a daily basis." *Auguste*, 395 F.3d at 154. We sympathize with Cherichel and others who must face such terrible conditions. However, we are bound to apply the definition of torture in the CAT and its implementing regulations. These conditions, although deplorable, do not rise to the level of torture in this case because Cherichel failed to establish that Haitian authorities have the specific intent to inflict severe physical or mental pain or suffering. As such, the conditions cannot form a basis for CAT relief.

For the foregoing reasons, we deny the petition for review.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 08-3736

SHOODLEY LEE CHERICHEL,

Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General of the United States,

Respondent.

Petition for Review
(A95-204-110)

ORDER

The petitioner's motion to stay the mandate pending the filing and disposition of a petition for a writ of certiorari in the Supreme Court of the United States, the respondent's response and the petitioner's reply have been considered by the Court and the motion is granted.

March 18, 2010

Ordered Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

/s/ Michael E. Gans

APPENDIX C

U.S. Department of Justice
Executive Office of Immigration Review

Falls Church, Virginia 22401

Decision of the Board of Immigration Appeals

In re: SHOODLEY LEE CHERICHEL

IN REMOVAL PROCEEDINGS

APPEAL

File: A095 204 110 – Elk River, MN

Date: October 29, 2008

ON BEHALF OF RESPONDENT: Kimberly Hunter, Esquire

ON BEHALF OF DHS: Terry M. Louie, Assistant Chief Counsel

CHARGE:

Notice:	Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] – Present without being admitted or paroled
Lodged:	Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)]

Crime involving moral turpitude

Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] – Controlled substance violation

APPLICATION: Deferral of removal pursuant to the Convention Against Torture.

This matter was last before the Board on September 14, 2007. At that time, we sustained the Department of Homeland Security's (DHS, formerly the Immigration and Naturalization Service) appeal of the Immigration Judge's May 3, 2007, decision granting the respondent deferral of removal under the Convention Against Torture and ordered him removed to Haiti.[1] On March 26, 2008, the United States Court of Appeals for the Eighth Circuit remanded this matter for the Board to reconsider its decision and to specifically address the "issue of whether Haitian authorities did not specifically intend to inflict severe physical or mental pain or suffering to criminal deportees . . . in light of the factfindings made by the immigration judge," as well as to clarify the scope of our review as it relates to such specific intent. *See* Eighth Circuit's Judgment and Government's Motion to Remand at 7-8.

First, we need not remand the case for further fact-finding as the evidentiary record is not outdated

[1] Due to his untimely asylum application and criminal convictions, the respondent was found to be ineligible for all requested forms of relief except deferral of removal (I.J. at 2, 11-20).

or otherwise incomplete. *See* 8 C.F.R. § 1003.1(d)(3)(iv). We hold that the record before us is sufficient to permit a new decision, in light of the Eighth Circuit's order, as to the respondent's eligibility for deferral of removal from Haiti pursuant to the Convention Against Torture.

As to the issue of our standard of review, credibility determinations and "facts found by an Immigration Judge can be reviewed only to determine if they are 'clearly erroneous,' but the Board 'may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges de novo.'" *See Matter of V-K-*, 24 I&N Dec. 500,501 (BIA 2008) (*quoting* 8 C.F.R. §§ 1003.1(d)(3)(i)-(ii) and noting that "the regulatory history surrounding the regulations . . . indicates that there was no intent to apply the restrictive 'clearly erroneous' test to mixed questions of fact and law where the so-called 'fact' consists of a finding as to the degree of possibility of a result occurring that is necessary to sustain a statutory basis for eligibility"). Thus, "we conclude that an Immigration Judge's prediction or finding regarding the likelihood that an alien will be tortured may be reviewed *de novo*" as "it relates to whether the ultimate statutory requirement for establishing eligibility for relief was met and is therefore a mixed question of fact and law, or a question of 'judgment.'" *See id.* at 501-02 (*quoting* 8 C.F.R. § 1003. 1(d)(3)(ii)).

In this case, the Immigration Judge found in her May 3, 2007, decision that the respondent and his mother presented credible testimony (I.J. at 9-10). Our decision on September 14, 2007, did not address

the issue of credibility as we held that the respondent, even if deemed credible, did not meet his burden of proof for deferral of removal under the Convention Against Torture. *See* Board's Decision at 2-3. Specifically, after examining the testimonial and documentary evidence presented by the respondent, we held that he failed to establish a more likely than not probability of being tortured at the hands or with the acquiescence of a public official if removed to Haiti.[2] Upon reconsideration of this case in light of the Eighth Circuit's remand, we hold that the record does not demonstrate that Haitian authorities specifically intend to inflict severe physical or mental pain or suffering to criminal deportees. In this regard, none of the Immigration Judge's factual findings—including those that differentiate the respondent's situation to that of the applicant in *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002)—shows that Haitian authorities, in their

[2] As indicated above, this is an issue that we review *de novo*. Also, in determining whether the established facts are sufficient to meet a legal standard, "the Board is entitled to weigh the evidence in a manner different from that accorded by the Immigration Judge, or to conclude that the foundation for the Immigration Judge's legal conclusions was insufficient or otherwise not supported by the evidence of record." *See Matter of A S B*, 24 I&N Dec. 493, 497-98 (BIA 2008) (noting that we do not engage in fact-finding when we determine that an Immigration Judge's legal conclusion—that the respondent established a well-founded fear—"was not supported by the facts of record" but rather rested on "speculative findings about what may or may not occur to the respondent in the future" given that, "among other reasons, it is impossible to declare as 'fact' things that have not yet occurred").

treatment of criminal deportees, specifically intend to inflict torture (I.J. at 13-18). *See* 8 C.F.R. § 1208.18(a)(1) (defining torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person").

Further, the country reports in the record are similarly silent as to the issue of whether authorities have the specific intention to inflict torture to criminal aliens deported to Haiti. *See Matter of J-E-E-*, 23 I&N Dec. 912, 917 (A.G. 2006) ("If the evidence is inconclusive, the applicant has failed to carry his burden."). Again, even considering the respondent's contention that he would be subject to indefinite mandatory detention in worsening prison conditions that are overcrowded and lack adequate food, water, and sanitation, we agree with the DHS that he has failed to show the requisite specific intent on the part of Haitian authorities to inflict torture to criminal deportees (Respondent's Br. at 3-6; DHS's Br. at 6-8). *See Matter of J-E-, supra*, at 301 (observing that there is no evidence that Haitian authorities "are intentionally and deliberately creating and maintaining such prison conditions in order to inflict torture," and that "prison conditions are the result of budgetary and management problems as well as the country's severe economic difficulties"); *see also* United States Department of State's *2006 Country Reports on Human Rights Practices for Haiti* at 4 (noting that "[c]itizens deported to the country after completing prison sentences in foreign countries were often detained," and that "[t]he government justified the practice because of the high level of insecurity in Port-au-Prince, considering those deportees with a record of violent or serious crime as

potential threats to the public order"). As such, we hold that the respondent failed to meet his burden of proof under the Convention Against Torture. *See* 8 C.F.R. § 1208.18(a)(5) ("In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture."); *Alemu v. Gonzales*, 403 F.3d 572, 576 (8th Cir. 2005) (*citing Matter of J-E-*, *supra*, at 301); *see generally Villegas v. Mukasey*, 523 F.3d 984, 989 (9th Cir. 2008) ("While Villegas is correct that a variety of evidence showed that Mexican mental patients are housed in terrible squalor, nothing indicates that Mexican officials (or private actors to whom officials have acquiesced) created these conditions for the specific purpose of inflicting suffering upon the patients."); *Pierre v. Attorney General of the United States*, 528 F.3d 180, 189-91 (3d Cir. 2008) (noting that, "Pierre will be imprisoned because the Haitian government has a blanket policy of imprisoning ex-convicts who are deported to Haiti in order to reduce crime," and finding no error in our decision in *Matter of J-E-*, *supra*, that "there is no evidence that Haitian authorities imprison ex-convicts . . . in order to cause them severe pain or suffering").

In sum, we conclude that we acted within our authority in finding that the Immigration Judge erred in holding that it is more likely than not that the respondent would suffer torture "by the government of Haiti or someone acting on behalf of the government" (I.J. at 18). Also, we note that we have not, in this decision or our previous order, "violated the prohibition against fact-finding on

appeal, as set out in 8 C.F.R. § 1003. 1 (d)(3)(iv)." *See Matter of A-S-B-*, *supra*, at 498 (observing that the "Immigration Judge's failure to explicitly discuss the end of the civil war and related issues in his decision did not render our mention of them to be improper fact-finding on appeal," and that "[w]ere we to treat the matter otherwise, we would be precluded from considering the total content of any documentary evidence submitted before the Immigration Judge unless the entire document was read into the Immigration Judge's decision") (*citing Rotinsulu v. Mukasey*, 515 F.3d 68, 73 (1st Cir. 2008), in noting that 8 C.F.R. § 1003.1(d)(3)(iv) was not intended to restrict the Board from weighing and evaluating evidence already presented to the Immigration Judge).

Therefore, as we determine that the respondent did not establish as a matter of law that it is more likely than not that he will be tortured if removed to Haiti, we conclude that he failed to meet his burden of proof under the Convention Against Torture. Accordingly, upon clarification of our prior decision, we shall again sustain the DHS's appeal and order the respondent removed to Haiti.

ORDER: The Department of Homeland Security's appeal is sustained.

FURTHER ORDER: The respondent is ordered removed to Haiti.

FOR THE BOARD

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 07-3313

Shoodley Lee Cherichel,

Petitioner,

v.

Michael B. Mukasey, Attorney General of the United States

Respondent.

Appeal from the Board of Immigration Appeals

(A95-204-110)

JUDGMENT

Upon consideration of the government's position to remand this petition for review and the petitioner's response in support, this petition for review is hereby remanded to the Board of Immigration Appeals for reconsideration in light of its scope of review and to further remand to the immigration judge if it determines that further factfinding is necessary.

The Court's mandate shall issue forthwith.

March 26, 2008

Order Entered Under Rule 27B(a):
Clerk, U.S. Court of Appeals, Eighth Circuit

/s/ Michael E. Gans

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 07-3313

Shoodley Lee Cherichel,

Petitioner,

v.

Michael B. Mukasey, Attorney General of the United States

Respondent.

Appeal from the Board of Immigration Appeals

(A95-204-110)

MANDATE

In accordance with the judgment of March 26, 2008, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

March 26, 2008

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX F

U.S. Department of Justice
Executive Office of Immigration Review

Falls Church, Virginia 22401

Decision of the Board of Immigration Appeals

In re: SHOODLEY LEE CHERICHEL

IN REMOVAL PROCEEDINGS

APPEAL

File: A095 204 110 –Bloomington, MN

Date: September 14, 2007

ON BEHALF OF RESPONDENT: Kimberly Hunter, Esquire

ON BEHALF OF DHS: Terry M. Louie, Assistant Chief Counsel

CHARGE:

Notice:.	Sec.	212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled
Lodged:	Sec.	212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude

Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] - Controlled substance violation

APPLICATION: Deferral of removal pursuant to the Convention Against Torture

The Department of Homeland Security (DHS, formerly the Immigration and Naturalization Service) has appealed the Immigration Judge's May 3, 2007, decision granting the respondent's application for a deferral of removal from Haiti pursuant to the Convention Against Torture. *See* 8 C.F.R. §§ 1208.17–18 (2007). The appeal will be sustained.

The DHS commenced removal proceedings by issuing a Notice to Appear on September 3, 2002 (Exh. 1), alleging that the respondent entered the United States at Miami, Florida, on January 1, 1982, and is subject to removal as he entered without being admitted or paroled (I.J. at 2). On March 8, 2005, the DHS charged that the respondent was subject to removal for having been convicted of a crime involving "moral turpitude based on his January 13, 2005, convictions for criminal vehicular homicide and criminal vehicular operation resulting in substantial bodily harm in violation of Minnesota Statute 609.21, subdivision 1(1), and 609.21, subdivision 2a(1), respectively, before the Dakota County District Court in Minnesota (I.J. at 2, 12; Exhs. 7, 8; Tr. at 99-105). Subsequently, on April 18, 2005, the DHS charged that the respondent was subject to removal for having been convicted of a controlled substance violation based on his April 18, 2000, conviction for the offense of possession of marijuana in violation of

Kentucky Statute 218A.1422 in the Boone District Court, Commonwealth of Kentucky (I.J. at 2, 10; Exhs. 6, 9,18). The record reflects that the respondent was sentenced to 48 months of incarceration for the criminal vehicular homicide offense and a concurrent term of 13 months for the offense of criminal vehicular operation resulting in bodily harm. (I.J. at 2, 12; Exhs. 7, 21).[1]

The Immigration Judge found that the grounds of removability had been established by clear and convincing evidence with respect to sections 212(a)(6)(A)(i) and 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. §§ 1182(a)(6)(A)(i) and 1182(a)(2)(A)(i)(I), respectively, but withheld making a determination with respect to section 212(a)(2)(A)(i)(I) of the Act; 8 U.S.C. § 1182(a)(2)(A)(i)(I), as the respondent was already found removable based on the former charges (I.J. at 2, 10). As to the respondent's application for relief (Exh. 19), the Immigration Judge after determining that the respondent was only eligible for a deferral of removal given that, Inter alga, his criminal vehicular convictions[1] constituted particularly serious crimes under the Act granted him a deferral of removal based on his claim that upon his return to Haiti, he will more likely than not be detained and tortured by government officials as a criminal deportee (I.J. at 2, 11-13, 18). The Immigration Judge also held that the pertinent facts of this case should be distinguished

[1] As the Immigration Judge's decision and other documents in the record provide a comprehensive account of the respondent's criminal record, we need not repeat such information here.

from those that resulted in the denial of relief in *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002) (I.J. at 13-18). The DHS argues on appeal that the Immigration Judge erred in concluding that the respondent met his burden of proof for a deferral of removal and that the Immigration Judge's decision is contrary to precedent authority (DHS's Br. at 4-8). *See Matter of J-E-*, *supra*.

To qualify for a deferral of removal under the Convention Against Torture, an applicant must prove that it is more likely than not that he or she will be tortured if returned to his or her country of origin, and that the act will be instigated by or with the consent or acquiescence of a public official or other person acting in an official capacity. *See* 8 C.F.R. § 1208.18(a)(l) (I.J. at 3-5). Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person, for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of, any kind. *See* Id. Torture is an extreme form of cruel and Inhuman treatment and does not include lesser forms of cruel, inhuman, or degrading treatment or punishment. *See* 8 C.F.R. § 1208.18(a)(2). Considerations in determining whether it is more likely than not that an alien will be tortured in the proposed country of removal include evidence of past torture; the ability to relocate; gross, flagrant, or mass violations of human

rights within the country of removal; and other relevant information. *See* 8 C.F.R. § 1208.16(c)(3).

As an initial matter, we note that the sole issue on appeal is whether the Immigration Judge properly determined that the respondent met his burden of proof for a deferral of removal pursuant to the Convention Against Torture. We decline to address the issue of credibility in this case. We find that the respondent, even if deemed credible (I.J. at 9-10), has not met his burden of establishing eligibility for relief.[2] Specifically, we conclude that the Immigration Judge erred as we find that the respondent failed to demonstrate that it is more likely than not that he will be tortured at the hands or with the acquiescence of a public official if he is removed to Haiti. *See Alemu v. Gonzales*, 403 F.3d 572,576 (8th Cir. 2005); *Matter of G-A-*, 23 I&N Dec. 366 (BIA 2002).

---

[2] We note that the Immigration Judge correctly determined that the respondent's application for relief is governed by the amendments to the Act brought about by the passage of the REAL ID Act of 2005, which was signed into law on May 11, 2005 (I.J. at 9). We note that the Immigration Judge correctly determined that the respondent's application for relief is governed by the amendments to the Act brought about by the passage of the REAL ID Act of 2005, which was signed into law on May 11, 2005 (I.J. at 9). See section 101(h)(2) of the *Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act of 2005*, Div. B, Pub. L. No. 109-13, 119 Stat. 231.

The respondent bears the burden of proof in demonstrating eligibility for relief, and if the evidence submitted is inconclusive, he has failed to satisfy this burden. *See Matter of J-F-F-*, 23 I&N Dec. 912,917 (A.G. 2006). In the instant matter, the Immigration Judge cited to the country condition reports in the record and observed that, in addition to a poor human rights record, the government of Haiti was responsible for beatings, torture, and deaths of detainees, and that prison conditions are characterized by poor sanitation and hygiene, malnutrition, overcrowding, substandard health care, and judicial corruption (I.J. at 14-16; Exhs. 18, 19). First, it is uncontested that the respondent has never been tortured or otherwise abused by the government of Haiti (I.J. at 6-7, 13, 18). Next, we note that the, United States Department' of State's *2006 Country Reports on Human Rights Practices for Haiti* reported that although criminal gangs frequently employed torturous practices, "[t]he law prohibits such practices and, unlike in 2005 there were no reports that government officials employed them" (Exh. 19 at 6). The record also reflects that "security and humanitarian improvements to prisons" were made according to' the most recent country report from the State Department (Exh. 19 at 8).[3]

[3] The country report also stated that "authorities freely permitted the International Committee of the Red Cross (ICRC), the Haitian Red Cross, and human rights groups to enter prisons and police stations, monitor conditions, and assist prisoners and detainees with medical care, food, and legal aid," and that the ICRC and the National Human Rights Network for Haiti "monitored prison conditions in cooperation with the (continued...)

Further, while we see no clear error in the Immigration Judge's findings regarding the abysmal nature of prison conditions in Haiti, we do not find that such conditions suffice to meet the burden of proof under the Convention Against Torture. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of: J-E-*, *supra*, at 299-304 (holding that neither indefinite detention nor generally poor prison conditions in Haiti constitute torture where there is no evidence that the authorities intentionally and deliberately detained deportees in order to inflict torture). Specifically, notwithstanding the Immigration Judge's conclusions regarding the conditions of Haitian prisons, as noted above, we do not find that such evidence rises to the level of torture as the record does not reflect that "Haitian authorities specifically intend to inflict severe physical or mental pain or suffering" to criminal deportees such as the respondent (DHS's Br. at 6).[4] *See Sheikh v. Gonzales*, 427 F.3d 1077, 1082 (8th Cir. 2005); *Samedov v. Gonzales*, 422 F.3d 704, 708 (8th Cir. 2005). Furthermore, the use of some physical force against persons in detention does not equate, without more, to the intentional infliction of torture. *See Matter of J-E-*, *supra*, at 300 ("In order to

(footnote continued)

Department of Prison Administration" (A.19 at 7, DHS's Br. at 8).

[4] Thus, whether or not prior conditions in Haiti have worsened since 2002 when *Matter of J-E-* was decided is not dispositive and arguably not even relevant to the respondent's eligibility for CAT.

constitute torture, the act must be specifically intended to inflict severe pain or suffering.").

In addition, we are not persuaded by the respondent's speculative contentions that because of the perception associated with being a criminal deportee from the United States, in addition to his unfamiliarity with Creole, he will somehow be subject to "torture" within the meaning of 8 C.F.R. § 1208.18(a) (I.J. at 6, 17; Tr. at 122). *See Matter of J-F-F-*, *supra*, at 919-920 ("Respondent has admitted that the Dominican Government has never tortured either him or, to his knowledge, anyone in his family. Putting aside whether he is more likely than not to find himself in police custody, respondent did not present any direct evidence that the police would more likely than not torture someone in his, position."); *see also Matter of Y-B-*, 21 I&N Dec. 1136,1139 (BIA 1998) (stating that "generalized information is insufficient" in demonstrating eligibility for relief). Therefore, we disagree with the Immigration Judge's finding that there is a more likely than not likelihood that the respondent will succumb to the aforementioned adverse factors present in Haitian prisons due to his status as a criminal deportee and that as a result, such treatment would rise to the level of torture.

Moreover, although the respondent apparently tested positive for tuberculosis, for which he obtained treatment (I.J. at 6; Tr. at 119-120), the Immigration Judge did not find that he has any medical condition that could potentially be aggravated due to the aforementioned prison conditions in Haiti as he "appear[ed] to be in relatively good health" (I.J. at 17). Also, notwithstanding the Immigration Judge's

discussion as to the respondent's length of residence in this country, the Attorney General has found such factors inapplicable in examining whether an alien met his burden of proof (I.J. at 17). *See Matter of J-F-F-*, *supra*, at 921 (Noting that hardship considerations–including a respondent's lengthy period of residence in the United States–"are not independently relevant to determining whether he is more likely than not to be tortured upon return").

Next, although we agree with the respondent's argument that the DHS has not sufficiently demonstrated that the respondent's mother would be able to readily secure his release from detention in Haiti (Respondent's Br. at 3; DHS's Br. at 4-5), we nonetheless agree with the DHS that the circumstances presented here are not significantly distinct from those we considered in *Matter of J-E-*, *supra*. *See Matter of J-E-*, *supra*, at 301 ("Although Haitian authorities are intentionally detaining criminal deportees knowing that the detention facilities are substandard, there is no evidence that they are intentionally and deliberately creating and maintaining such prison conditions in order to inflict torture."). Likewise, we find the respondent's reliance on other authorities to be unavailing as we conclude that he has not established eligibility for relief (Respondent's Br. at 6-8).

In sum, we find that the respondent failed to demonstrate that it is more likely than not that he will be tortured at the hands or with the acquiescence of a public official if he is removed to Haiti. *See* 8 C.F.R. §§ 1208.17–18. Therefore, we will reverse the Immigration Judge's decision that the respondent established eligibility for a deferral of

removal under the Convention Against Torture. Accordingly, the DHS's appeal will be sustained. Consequently, as there are no other applications for relief pending before the Board, the respondent will be ordered removed to Haiti.

FOR THE BOARD

APPENDIX G

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BLOOMINGTON IMMIGRATION COURT
7850 METRO PARKWAY, SUITE 320
BLOOMINGTON, MINNESOTA 55425

File #: A95-204-110	)	Date: May 3, 2007
	)	
In the Matter of:	)	
	)	
Shoodley Lee CHERICHEL	)	IN REMOVAL PROCEEDINGS
	)	
Respondent.	)	**IHP DOCKET**
	)	

Charge:	Section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA" or "the Act"), as amended, in that respondent is an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.
Lodged Charges:	Section 212(a)(2)(A)(i)(I) of the Act, as amended, in that the respondent is an alien who has been convicted of, or who admits having committed, or who admits committing acts which constitute

the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime.

Section 212(a)(2)(A)(i)(II) of the Act, as amended, in that the respondent is an alien who has been convicted of, or who admits having committed acts which constitute the essential elements of, a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802)).

Applications: Asylum, Withholding of Removal, and Article 3 of the Convention Against Torture

On behalf of the Respondent:

Kimberly Hunter
Kim Hunter & Associates, P.L.L.C.
821 Raymond Avenue, Suite 305
St. Paul, MN 55114

On behalf of the DHS:

Terry Louie, Assistant Chief Counsel
Department of Homeland Security
P.O. Box 11898
St. Paul, MN 55111-0898

WRITTEN DECISION OF THE IMMIGRATION JUDGE

Introduction and Procedural Summary

The respondent is a 28-year old male, native and citizen of Haiti, who entered the United States without inspection at Miami, Florida, on or about January 1, 1982. Respondent was personally served with a Notice to Appear ("NTA") on September 3, 2002. Ex. 1. The respondent admitted factual allegations 1-4 contained in the NTA (Exhibit 1) and conceded that he is removable as charged in the NTA on November 20, 2006. A Form I-261, Additional Charges of Inadmissibility/Deportability, was filed by DHS on March 8, 2005. Ex. 8. Respondent initially denied the allegations and charge in this document. On March 19, 2007, the respondent admitted allegations 5 & 6 of this I-261, but denied the charge under INA § 212(a)(2)(A)(i)(I) [CIMT] due to a lack of the *mens rea* component. Exhibit 8. On April 18, 2005, DHS filed an additional Form I-261. Ex. 9. Allegation 7 and the charge under INA § 212(a)(2)(A)(i)(II) [crime relating to a controlled substance] were sustained by the Court on March 19, 2007. The respondent declined to designate a country of removal. The Court has designated Haiti should such action become necessary.

Respondent was convicted on January 13, 2005, in Dakota County District Court, State of Minnesota, for the offense of Criminal Vehicular Homicide in violation of Minnesota Statutes § 609.21, subd. 1(1) (grossly negligent). See I-261, Ex. 8. In addition, on January 13, 2005, the respondent was convicted in Dakota County District Court, State of Minnesota,

for the offense of Criminal Vehicular Operation Resulting in Substantial Bodily Harm in violation of Minnesota Statute § 609.21, subd. 2a(1) (grossly negligent). Id. Respondent was sentenced to the Department of Corrections for a period of 48 months on the Criminal Vehicular Homicide charge. The respondent also has a 2000 conviction for Possession of Marijuana in violation of Kentucky Statute § 218A.1422. See I-261, Ex. 9.

The respondent's case was continued various times while his appeal was pending for his Minnesota criminal convictions. The Minnesota Court of Appeals upheld the respondent's convictions for criminal vehicular homicide and criminal vehicular operation resulting in substantial bodily harm through an unpublished decision filed on September 5, 2006. See Ex. 21.

The respondent did not file for asylum within one year of his arrival in the United States or within a reasonable period of time after turning 18 years of age, and is therefore barred from seeking asylum under § 208 of the Act. The Court finds that the respondent is also ineligible for voluntary departure under 240B(b) of the Act. Furthermore, the Court finds that he has been convicted of a particularly serious crime, thus barring him from withholding of removal under § 241(b)(3) of the Act, and under the Convention Against Torture. Accordingly, the respondent is only eligible to seek Deferral of Removal under Article 3 of the Convention Against Torture. His application for Deferral of Removal will be granted for the reasons set forth in the Analysis section.

Applicable Law

Asylum

Under § 208 of the Act, the Attorney General may grant asylum, as a matter of discretion, to an individual who is a "refugee" within the meaning of § 101(a)(42) of the Act. A refugee is defined as an individual who is unwilling or unable to return to his country of nationality because of past persecution or because of a "well-founded fear" of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA §§ 208 and 101 (a)(42); 8 C.F.R. § 1208.13. In order to establish a "well-founded fear" of persecution, the applicant must show that it is both subjectively genuine and objectively reasonable through credible, direct, and specific evidence which demonstrates that he possesses a belief or characteristic that a persecutor seeks to overcome in others by means of punishment of some sort, the persecutor is aware or could become aware that he possesses this belief or characteristic, the persecutor has the capability of punishing him, and the persecutor has the inclination to punish him. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987)

Withholding of Removal

To be eligible for withholding of removal pursuant to Section 241(b)(3) of the Act, an alien must establish it is "more likely than not" that the alien's life or freedom would be threatened in the country designated for removal on account of one of the five grounds enumerated in the Act. INA § 241(b)(3); 8 C.F.R. § 1208.16; Mogharrabi, supra. An applicant

for asylum or withholding bears the evidentiary burdens of proof and persuasion to establish his/her claim. The requisite burden of proof to establish eligibility for asylum is lower than that required for withholding of removal.

Relief under Article 3 of the Convention Against Torture

The eligibility for relief under the Convention against Torture is primarily set forth in 8 C.F.R., §§ 1208.16 through 1208.18. The burden of proof is on the applicant to establish that it is "more likely than not" that he/she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

The regulations, at 8 C.F.R. § 1208.18(a)(1)-(8), set forth the following:

> (1) "Torture" is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman, or degrading treatment or punishment that do not amount to torture.

(3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not, include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

(4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from,

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the

administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

(5) In order to constitute torture, an act, must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture,

(6) In order to constitute torture the act must be directed against a person in the offender's custody or physical control.

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

(8) Noncompliance with applicable legal procedural standards does not *per se* constitute torture. See 8 C.F.R. § 208.18(a).

In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered; including, but not limited to:

(i) evidence of past torture inflicted upon the applicant;

(ii) evidence that the applicant could relocate to a part of the country of removal where, he or she is not likely to be tortured;

(iii) evidence of gross, flagrant or mass violations of human rights within the country of removal, whore applicable; and

(iv) other relevant information regarding the conditions in the country of removal. See 8 C.F.R. § 1208.16(c)(3)

A respondent who is barred from the withholding of removal may still be granted deferral of removal under the Convention Against Torture:

(a) Grant of deferral of removal. An alien who: has been ordered removed; has been found under § 1208.16(c)(3) to be entitled to protection under the Convention Against Torture; and, is subject to the provisions for mandatory denial of withholding of removal under § 1208.16(d)(2) or (d)(3), shall be granted deferral of removal to the country where he or she is more likely than not to be tortured. See 8 C.F.R. § 1208.17(a).

The Evidence Presented

Testimony of the Respondent, Shoodley Cherichel, of the hearing held on March 19, 2007

Direct Examination

The respondent testified that he is 27 years old and has lived in the United States for 25 years. He

believes that he arrived in the U.S. with his mother, but he cannot recall the exact circumstances of his arrival. Currently, respondent is in custody and has been in custody in Minnesota since January 13, 2005. Respondent's father, Armand, is deceased. Armand was a naturalized citizen. Respondent's mother is Meprisena Themistol (a.k.a. Cherichel). She is a naturalized U.S. citizen and lives in Sarasota, Florida. Respondent also has one sister, Wiladine Mercinak, who he believes is a U.S.C., and two brothers, Marc Cherichel, who is a U.S.C., and Gene Armand Cherichel, who is a U.S.C.

Respondent does not believe that he has any family living in Haiti. His aunts and uncles are in the United States. He also has one surviving grandmother in Fort Lauderdale, Florida. Respondent testified that he does not speak Creole fluently and understands approximately 20-30% of Creole. In terms of his physical health, the respondent has been tested for various diseases and vaccinated against certain diseases. He tested positive for tuberculosis, though he took medication to treat it.

Respondent thinks that he would live in the streets if returned to Haiti or else he would be imprisoned or detained. He does not know anyone who has returned to Haiti, though he heard a report that someone had been executed upon return to Haiti. Respondent is afraid to return to Haiti because he has lived in the U. S. his whole life and does not believe that the government of Haiti would protect him because of the violence in the country. Respondent is worried that people in Haiti might think he is rich because he would stand out as

appearing "American" based on physical characteristics and his English-speaking ability, and he is worried about kidnapping and corruption.

Cross-Examination

Respondent testified that he is not involved in politics and his parents were not members of a political party. As far as the respondent is aware, his mother and his siblings have not returned to Haiti. The respondent has not returned to Haiti, either. He does not believe that his parents or siblings have been physically harmed in Haiti.

Questions from the Court

Respondent stated that he has not had much contact with family in Haiti since he came to the U.S., though he had heard through one of his uncles that one of his aunts was killed in 1997 or 1998. His other grandparents, besides the grandmother in Fort Lauderdale, passed away in Haiti. Respondent does not believe that he was physically harmed in Haiti when he lived there as a young child, although he has some stitches, marks, and bruises from an unknown cause.

Testimony of the Respondent's Mother, Meprisena Themistol, at the hearing held on March 19, 2007

Direct Examination

Ms. Themistol has lived in the U.S. since 1981. She entered the U.S. by herself by boat. She testified that the respondent arrived by boat a couple of years after Ms. Themistol arrived in the U.S. Respondent had been left with Ms. Themistol's mother-in-law. Ms. Themistol's uncle helped obtain a boat to bring

the children, including the respondent, to the U.S. in 1984. Respondent was approximately 3 ½ years old at the time. Ms. Themistol's husband came to the U.S. in 1980. When Ms. Themistol arrived in the U.S. in 1981, she lived in Belgrade, FL, with her husband.

Ms. Themistol testified that she has no brothers or sisters in Haiti. Her father is deceased and her mother lives in Fort Lauderdale, FL. Ms. Themistol's husband died in 2003. She stated that her husband's parents are deceased and his siblings are in the U.S., with the exception of one sister who lives in Canada.

She does not believe that respondent has any relatives in Haiti. Respondent has not been to Haiti since his arrival in the U.S. as a child.

She applied for lawful permanent resident status for all three of her children in the early 1990s. She believes that her son, Marc, has lawful status and may be a U.S.C. Her daughter, Wiladine, is not a lawful permanent resident yet, although she does have an approved I-130 petition. The respondent's I-130 petition has not been completed.

Cross-Examination

Ms. Themistol testified that she travels to Haiti "all the time." She used to do business in Haiti and spent more time there then, though she still goes to Haiti sometimes for personal reasons. She most recently went to Haiti for a 3-week trip in December 2006. She testified that she is a Haitian citizen and also is a U.S. citizen with a U. S. passport. She has a passport to go to Haiti. She has gone to Haiti a few times in the last three years. Ms. Themistol is currently a Certified Nursing Assistant and no

longer runs her own business. She testified that she was not physically harmed in Haiti, and neither were husband or children. She has not been hurt in Haiti when she has returned for her trips. She does not believe that the respondent would have anywhere to go if he were returned to Haiti and that there is no one in Haiti to help him.

Questions by the Court

Ms. Themistol testified that she was not sure how many trips she has made to Haiti. She indicated that she returned to Haiti in 1988 because of the death of her father, and traveled to Haiti again approximately 5-10 times for her business. She did not have a home in Haiti when she conducted business there. Instead, she would buy merchandise in the U.S., send the merchandise to Haiti by boat, and then sell the merchandise in Haiti. After she divorced, she did not have money to do this any longer. She sold her goods in Port-de-Paix.

She indicated that she had a U.S. passport and presented it to the Court during the hearing. It lists her married name (Meprisena Fideum). Prior to obtaining her U.S. passport, Ms. Themistol used her green card and her Haitian passport to go to Haiti. Her Haitian passport was taken when she received her U.S. passport. She also presented her naturalization certificate to the Court. She stated that on all of her visits to Haiti, she received the permission of the Haitian government to enter Haiti and was an LPR when she returned to Haiti for her father's death. She testified that she has never been kidnapped in Haiti, although she never stays in the capital because it is very dangerous. Instead, she

takes a bus or an airplane to go to Port-de-Paix, which is about 8-9 hours away from the capital by car.

Redirect Examination

Ms. Themistol testified that she had no criminal record in the U.S. prior to becoming an LPR. She is currently a CNA at a nursing home, a job that she has held for about a year. She makes $960 every two weeks, with occasional overtime pay. She no longer rents storage space in Haiti for the business that she ran there.

Re-Cross Examination

Ms. Themistol testified that she does not have any health problems.

Exhibits:

The Court has considered the testimony of the respondent, in addition to the documentary evidence submitted by the respondent and the government in reaching this decision.

Ex. 1	Notice to Appear, dated September 3, 2002
Ex. 2	Handwritten information regarding citizenship status of the respondent's parents and siblings
Ex. 3	DHS exhibit dated May 1, 2003, containing CIS printouts of the respondent's mother and father.
Ex. 4	DHS exhibit filed September 26, 2003, containing CIS printout and copy of INA § 320

Ex. 5	DHS exhibit dated February 6, 2004, containing 1-213 and criminal records
Ex. 6	DHS exhibit dated March 24, 2004, containing records relating to respondent's arrests/convictions for various offenses
Ex. 7	DHS exhibit dated March 3, 2005, containing the respondent's conviction record
Ex. 8	DHS exhibit dated March 8, 2005, containing 1-261 and conviction records for respondent
Ex. 9	DHS exhibit dated April 18, 2005, containing 1-261
Ex. 10	Joint Motion to Continue (IHP) Master Calendar Date filed January 19, 2006
Ex. 11	Order of the Immigration Judge dated January 20, 2006, granting the Joint Motion to Continue.
Ex. 12	Joint Motion to Continue (IHP) Master Calendar Date filed April 19, 2006
Ex. 13	Order of the Immigration Judge dated April 19, 2006, granting the Joint Motion to Continue
Ex. 14	Joint Motion to Continue (IHP) Master Calendar Date filed July 6, 2006, and granted by IJ Dierkes on July 7, 2006
Ex. 15	Respondent's I-589 filed on November 20, 2006
EX. 16	Letter sent to State Department requesting an advisory opinion regarding

respondent's asylum, withholding of removal, and Torture Convention application dated November 20, 2006

Ex. 17 Respondent's updated Form G-325A filed February 22, 2007

Ex. 18 DHS exhibit dated February 28, 2007, containing Department of State Profile of Asylum Claims for Haiti; Department of State Country Report for Haiti; Department of State Background Notes for Haiti; Record relating to the respondent's arrest/conviction for possession of marijuana; and CIA report on Haiti

Ex. 19 Respondent's exhibit dated March 9, 2007, containing respondent's Redlined Form I-589; Country Conditions Reports; and Witness List

Ex. 20 Respondent's exhibit dated March 16, 2007, containing various legal arguments/case law for the respondent's upcoming hearing

Ex. 21 Copy of unpublished 8th Circuit decision regarding the respondent's appeal of his criminal conviction filed March 19, 2007

Ex. 22 Copy of the respondent's mother's Certificate of Naturalization dated December 3, 1993, and copies of pages of her passport

Legal Analysis

Credibility

In assessing the respondent's claim, the Court must first address the respondent's credibility. The Court finds the respondent's testimony to be generally credible with regard to his fear in returning to Haiti. See Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998). The Board has held that an immigration judge may make an adverse credibility finding and deny an alien's application for asylum and withholding of removal when (1) discrepancies are present in the Respondent's documentary and testimonial evidence; (2) those inconsistencies and omissions provide good reason to conclude that-the Respondent's testimony is incredible; and (3) Respondent fails to provide a convincing explanation for those discrepancies. See Matter of S-A-, 22 I&N. Dec. 1328, 1331 (BIA 2000) (citing Matter of A-S-, supra).

The REAL ID Act of 2005, which is applicable to asylum, withholding or other relief from removal applications initially filed on or after May 11, 2005, may apply to Respondent's case. See Matter of S-B-, 24 I&N Dec. 42 (BIA 2006); see also INA § 240(c)(4)(B)-(C); INA § 241 (b)(3)(C) (withholding). In Matter of S-B-, the Board found that the REAL ID Act of 2005 applied to applications for relief from removal initially filed on or after May 11, 2005. As respondent filed his relief applications after May 11, 2005, this Court will analyze Respondent's credibility under the REAL ID Act.

Under the REAL ID Act, the following factors, taking into consideration the "totality of the

circumstances," may be considered in the assessment of an applicant's credibility: demeanor, candor, responsiveness of the applicant, the inherent plausibility of the claim, the consistency between oral and written statements, the consistency of such statements with evidence of record, and any inaccuracy or falsehoods in such statements, even if those in accuracies or falsehoods are not centrally related to the applicant's claim. INA § 208(b)(1)(B)(iii). Lack of corroborative evidence is not necessarily fatal to an asylum application, as uncorroborated testimony that is credible, persuasive, and specific maybe sufficient to sustain the burden of proof to establish a claim for asylum. See INA § 208(b)(1)(B)(ii); 8 C.F.R. § 1208.13(a); Matter of Dass, 20 I&N Dec. 120, 124 (BIA 1989); Matter of Mogharrabi, 19 I&N Dec. 439, 444-445 (BIA 1987). However, where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence must be provided, so long as the applicant has the evidence or can reasonably obtain it. INA § 208(b)(1)(B)(ii); Matter of S-M-J-, 21 I&N Dec. 722, 725 (BIA 1997). If such evidence is unavailable, the applicant must explain its unavailability, and the immigration Judge must ensure that the applicant's explanation is included in the record. See Matter of S-M-J-, supra. The absence of such corroboration can lead to a finding that an applicant has failed to meet his or her burden of proof, if the Court also encounters inconsistencies in testimony, contradictory evidence, or inherently improbable testimony. Id.

The respondent testified that he is afraid to return to Haiti because he would be viewed as "American" and will be detained as a result of his criminal status. In addition, he fears kidnapping and other mistreatment. His testimony is consistent with the current country conditions in Haiti. The Court has some concerns with regard to the respondent's testimony about his manner of arrival into the United States as he stated that he entered the U.S. with his mother, but his mother testified that the respondent entered the U.S. with the aid of an uncle. However, he explained that he arrived in the U.S. at a very young age and did not know the details of his arrival in the U.S. In addition, the respondent testified that his mother had not returned to Haiti since coming to the United States. The respondent's mother, on the other hand, indicated in hex testimony that she had returned to Haiti several times over the years since her initial arrival in the United States for both personal and business reasons. Despite these discrepancies, the Court will find the respondent generally credible with regard to his fear of returning to Haiti based on his circumstances as a criminal deportee who has spent the majority of his life in the United States.

As for the respondent's mother, the Court will also find that she was generally credible in her testimony, despite the few discrepancies between her testimony and the respondent's testimony. The Court believes the respondent's mother when she states that there is no one in Haiti that could assist the respondent.

Removability Analysis

Removability has been established by clear and convincing evidence with regard to the charge under INA § 212(a)(6)(A)(i), as the respondent conceded this charge at the hearing held on November 20, 2006.

The Court sustained the charge under INA § 212(a)(2)(A)(i)(II), regarding the respondent's controlled substance conviction, at the hearing held on March 19, 2007. The record reflects that the respondent was convicted in April 2000 of Possession of Marijuana in violation of Kentucky Statute § 218A.1422. A copy of a tab charge was filed with the Court on February 28, 2007. This document indicates the respondent's case number in Boone District Court, State of Kentucky, as "00-M-01059." As to Charge 1, Cit # 0A1627072-1, this document indicates a guilty plea ("GP"), a fine of $100, and court costs with the date "April 18, 2000" written next to it. Ex. 18, p. 65. An additional document also shows the case number "00-M-01059" along with the respondent's name, and lists the charge (labeled charge 1) of "Possession of Marijuana" with the markings "G/P" and "$100 and cost" and the same date of April 18, 2000. Ex. 18, p. 68. At the March 19, 2007 hearing, DHS indicated that these documents had been certified by Boone District Court. DHS also submitted an uncertified copy of a "Case History" print-out for respondent, which contains the same case number "00-M-01059" and lists the various actions that were taken in respondent's case, including a finding of "guilty" on April 18, 2000, for Charge 1, Possession of Marijuana. Ex. 18, p. 63-64. Even if this document

were not considered, the other documents cited above establish the respondent's 2000 conviction for Possession of Marijuana in violation of Kentucky law.

As for the charge under INA § 212(a)(2)(A)(i)(I), as an alien who has committed a crime involving moral turpitude, the Court will withhold ruling on this charge, as the respondent is removable on two other grounds.

Asylum Analysis

Respondent entered the United States without inspection at or near-Miami, FL on or about January 1, 1982. He did not apply for asylum until November 20, 2006. Because the respondent failed to file for asylum within one year of his arrival in the U.S. or within a reasonable period of time after reaching the age of 18, he is time-barred from relief in his asylum claim under § 208 of the Act. See INA § 208(a)(2)(B). The Court will also deny the respondent's asylum application in the exercise of discretion due to his three criminal convictions.

Voluntary Departure Analysis

In order to be eligible for voluntary departure at the conclusion of removal proceedings under § 240B(b) of the Act, an alien must show that: (1) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the Notice to Appear was served under § 239(a); (2) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure; (3) the alien is not deportable under § 237(a)(2)(A)(iii) (aggravated felon) or

§ 237(a)(4) (security and related grounds); and (4) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so. INA § 240B(b); 8 C.F.R. § 240.26(c)(l). In order to establish that the alien has the means to depart, the alien must present a passport or other travel documentation sufficient to assure lawful entry into the country to which the alien is departing. 8 C.F.R. § 1240.26(c)(2).

Under INA § 101(f)(7), an alien lacks good moral character (during the period required for good moral character) where the alien has during such period "been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless o f whether the offense, or offenses, for which he has been confined were committed within or without such period." The respondent was convicted in 2005 of Criminal Vehicular Homicide under Minnesota Statute § 609.21, subd. 1(1), for which he received a 48-month sentence, which is well beyond the 180 days listed in INA § 101(f)(7). Therefore, the respondent lacks the requisite good moral character to be granted voluntary departure. In addition, based on the respondent's Minnesota convictions for Criminal Vehicular Homicide and Criminal Vehicular Operation, and his Kentucky conviction for Possession of Marijuana, the Court finds the respondent ineligible for voluntary departure under INA § 240B as a matter of discretion.

Particularly Serious Crime Analysis

This Court will find that the respondent has been convicted of a particularly serious crime which also bars his eligibility for withholding of removal under § 241(b)(3) of the Act and under Article 3 of the Convention Against Torture. Since the respondent was sentenced to less than five years for his felony conviction, this Court must examine the circumstances of the respondent's case in deciding whether his conviction constitutes a crime that is "particularly serious" and which precludes him from applying for withholding of removal. See Matter of S-S-, 22 I&N Dec. 458,464 (BIA 1999), overruled with regard to aggravated felonies for unlawful trafficking in Matter of Y-L-, A-G, R-S-R-, 23 I&N Dec. 270 (A.G. 2002).

When judging the seriousness of a crime, the Court considers factors such as the nature of the conviction, the circumstances and underlying facts of the conviction, and the type of sentence imposed, and most important, whether the type and circumstances of the crime indicate that the respondent is a danger to the community. Matter of S-S-, supra; Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982), modified, Matter of C-, 20 I&N Dec. 529 (BIA 1992); Matter of Gonzalez, 19 I&N Dec. 682 (BIA 1988). Subsequent to Matter of Frentescu, the BIA held that once an alien is found to have committed a particularly serious crime, there is no need for a separate determination of whether the alien is a danger to the community. See Matter of K-, 20 I&N Dec. 418 (BIA 1991), aff'd Kofa v. INS, 60 F.3d 1084 (4th Cir. 1995); see also Matter of O-T-M-T-, 21 I&N Dec. 639,646 (BIA 1996).

The criminal Amended Complaint sets forth the facts of the respondent's Minnesota convictions. Ex. 7, p. 8 - 13. Essentially, the respondent was driving a vehicle at a high rate of speed with two female passengers and the vehicle left the road, landing in a pond below an embankment. One of the passengers in the vehicle died as a result of drowning after apparently being trapped in the vehicle, while the other passenger was able to escape the vehicle, but suffered substantial bodily injury, In Count I of the Amended Complaint, the respondent was charged with operating a motor vehicle in a grossly negligent manner, causing the death of a human being. (Emphasis added). In Count II of the Amended Complaint, the respondent was charged with causing substantial bodily harm to another as a result of operating a motor vehicle in a grossly negligent manner. (Emphasis added).

The Court has reviewed the conviction record for this case and feels that the nature of the respondent's convictions, involving death and substantial bodily harm to others, reflects that they are particularly serious crimes. He engaged in fast driving without regard for the safety of his passengers, resulting in serious harm and death. Respondent, as noted above, was convicted in 2005 in Dakota County District Court for the offenses of Criminal Vehicular Homicide in violation of Minnesota Statute § 609.21, subd. 1(1) and Criminal Vehicular Operation Resulting in Substantial Bodily Harm in violation of Minnesota Statute § 609.21, subd 2a(1). The respondent ultimately received a 48-month sentence for the Criminal Vehicular Homicide charge, which is a substantial term of imprisonment.

(See Matter of S-S-, Supra at 465, stating "The length of sentence . . . has a bearing on our characterization of the respondent's conviction."). The Court will therefore find that they type and circumstance of the crime are such that he is a danger to the community.

For the reasons set forth above and in looking at the totality of the circumstances, this Court finds that the respondent's conviction constitutes a particularly serious crime. Accordingly, the respondent is ineligible for withholding of removal under § 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture. See 8 C.F.R. § 1208. 16(d)(2)-(3).

Deferral of Removal under the Torture Convention Analysis

Based upon a review of the testimony and the documentary evidence in the record, this Court finds that the respondent has not been tortured by the government of Haiti in the past. However, the respondent has met his burden of showing that it is "more likely than not" that he would be tortured by the government should he be removed to Haiti as a criminal deportee.

***Matter of J-E-* Analysis**

In Matter of J-E-, 23 I&N Dec. 291 (BIA 2002), the Board addressed a Haitian national's Convention Against Torture claim regarding prison conditions in Haiti. That respondent had been convicted of sale of cocaine, and feared returning to Haiti as a criminal deportee. The Board focused on two issues: (1) "whether any actions by the Haitian authorities - indefinite detention, inhuman prison conditions, and

police mistreatment - constitute torturous acts within the definition of torture" under the regulations and (2) "whether the respondent has established that it is more likely than not that he will be tortured if removed to Haiti." Id. at 292. In reaching its conclusion that the respondent in Matter of J-E was ineligible for relief under the Convention Against Torture, the Board looked at whether the Haitian authorities had the "specific intent to inflict severe physical or mental pain or suffering" with regard to the detention of criminal deportees and determined that Haiti's "detention practice alone" did not rise to the level of torture. Id. at 300.

The Board attributed the conditions in Haitian prisons to a lack of resources and effective management, and the found that the Country Report indicated that the government was attempting to improve conditions, Matter of J-E-, supra, at 300. The Board also found that the record described only Isolated instances of mistreatment" rising to the level of torture in Haitian prisons. Id. at 302. In support of his claim that he feared persecution and torture by Haitian authorities, the respondent in Matter of J-E-, submitted five newspaper articles concerning Haitian prison conditions. The record also included a letter from the Department of State's Office of Country Reports and Asylum Affairs in which the Director of that office reported that criminal deportees in Haiti were detained in Haiti until a commission determined their release date and that they may be held for weeks. The Board analyzed the evidence presented by the respondent, and found, as noted above, that he had only established "isolated" incidents of torture in Haitian

prisons. The Board further noted that there was "no evidence that deliberately inflicted acts of torture are pervasive and widespread; that the Haitian authorities use torture as a manner of policy; or that meaningful international oversight or intervention is lacking." Id. at 303.

Although the respondent in the instant case is similar to the respondent in Matter of J-E- based on his fear of being imprisoned and tortured as a criminal deportee, the respondent's case is distinguishable from that of the respondent in Matter of J-E- for the reasons set forth below.

First, unlike the respondent in Matter of J-E-, who provided five newspaper articles and one Department of State letter in support of his claim, the respondent in this case has presented extensive evidence and information concerning prison conditions in Haiti and country conditions as a whole. Respondent has submitted approximately 42 reports and articles concerning country conditions in Haiti. As an initial matter, the Court has considered the Department of State Country Reports in the record. The BIA gives great weight to the Information provided by the Department of State. Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997). The Department of State Country Report on Human Rights Practices in Haiti (2005) states the following, in part (quotation marks omitted) (Ex. 18);

- The government of Haiti has a poor human rights record, with reports of arbitrary killing by the Haitian National Police, disappearances, overcrowding and poor sanitation in prisons. (p.1)

- There were deaths in prison during the year. (p.1)

- The Carrefour Police Station (Omega) was known as a center of torture and beatings of detainees. There were reports of scars, beatings, hearing problems and earaches (most likely due to kalot marassa, a practice of boxing the ears of detainees, amounting to a form of torture). (p.3).

- The report notes that prison conditions worsened during the near. Only 17 of 21 prisons were rehabilitated and rendered functional and there were insufficient facilities to bold prisoners, along with severe overcrowding. The National Penitentiary was at more than double its capacity. (p.3) (emphasis added)

- There was a lack of basic hygiene in detention facilities, along with malnutrition, poor quality health care, 24 hours confinement (in some facilities), and problems of lack of water and disease. (p.3)

The current Department of State Country Report on Human Rights Practices in Haiti (2006) (Ex. 19) contains largely the same information as the 2005 report and states the following, in part (quotation narks omitted):

- The Haitian government has a poor human rights record (as noted in 2005, there were reports of extrajudicial killings by the Haitian National Police, overcrowding and poor sanitation in prisons, occasional arbitrary arrests, prolonged pretrial detention, and ineffective measures to address killings by members of gangs and other

armed groups, along with reports of kidnapping, torture, mid cruel treatment by gang members and criminals). (p. 5)

- The report also notes incidents where the HNP unlawfully killed citizens or acted without authority. The Haitian government has been unable to conduct reliable investigations and there were reports of excessive force by prison guards, leading to two suspected deaths: (p. 5)

- Much of the violence in Haiti as a whole stems from organized criminal gangs, particularly in alums, and kidnapping is widespread. (p. 6)

- The prisons are overcrowded, poorly maintained, unsanitary; and there are concerns regarding a lack of basic hygiene, malnutrition, poor quality health care, rodents, a lack of adequate food or sanitation, a lack of water, disease, guard corruption, riots and violence, and prison capacity (p. 7)

- The report notes a frequent disregard by police to present detainees before a judge within 48 hours of their detention. (p. 8)

- Citizens deported to the country after completing prison sentences in foreign countries were often detained, although they had not violated any domestic laws. These detentions sometimes lasted several months. The government justified the practice because of the high level of insecurity in Port-au-Prince, considering those deportees with a record of violent or serious crime as

potential threats to the public order. In September a court ruled that such detentions were not valid under the law; however, authorities continued to temporarily incarcerate deportees previously convicted of violent crimes. (p, 8)

- There are concerns regarding judicial corruption and 84% of prison detainees are awaiting trial. (p. 9-10).

- In addition, there are problems with respect for civil rights. (p. 12)

- The report notes a general lack of enforcement of the laws and standards on the part of the Haitian government. (p. 15)

Respondent has also provided a report from UNHCR (in Ex. 19) which states the following, in part:

- UNHCR cites to a 2000 Amnesty International report where AI found that "overcrowding coupled with outdated facilities and a lack of resources has created conditions that are far below the level required by the Standard Minimum Rules for the Treatment of Prisoners and in some instances constitute cruel, inhuman, and degrading treatment.'" (p. 43)

- As many as 18% of Haitian prisoners suffered from malnutrition (in 2000). (p. 43)

- One report from a journalist in 2000 indicated that conditions in the jails were "horrifying." "In

a twelve by fifteen foot cement cell, about forty men sat one behind the other in tight rows, knees to chins. There is no toilet, no s ink, and no room to lie down. (p. 44)

- A representative of Alternative Chance reports in 2000 that police holding cells are generally 10 feet by 11 feet and hold 20 people on average. These cells "have no toilets and no sinks. Usually those wishing to use a toilet must use a bag to defecate in or they urinate in a communal bucket which stays inside the cell...There is typically no fan available as most police stations have little or no electricity." (p. 44)

- Another report indicates that criminal deportees are held indefinitely unless they have family or friends who are "milling to claim responsibility," in which case it can still take "about three months" for the deportee to be released. (p. 47)

- A family member who claims responsibility must agree in writing to take the place of the released criminal deportee i f it is found that a deportee committed a crime and was not apprehended. (p. 47)

- The report also notes that "[i]n the event that the deportee has no family member in Haiti or cannot contact them, they stay indefinitely in detention." (p..48)

- The report goes on to cite examples of criminal deportees who either could not contact family members or did not have family in Haiti who

could assist them and who had been in the National Penitentiary for 9-10 months. (p. 48)

Many of the reports submitted by the respondent highlight the poor conditions in Haitian jails and prisons which have not improved over the years, and the conditions faced by criminal deportees upon their removal to Haiti. The record also contains information about general country conditions the respondent would face as a criminal deportee who had spent many years in the United States. For instance, the respondent has presented several articles on violence, kidnapping and gangs in Haiti. See generally Ex. 19. The Department of State Consular Information Sheet indicates as of March 2007 that there are no "safe areas" in Haiti and that it is uncertain as to whether the government can maintain order throughout the country. See Ex. 19, p. 17. Many of the other reports also indicate high levels of violence in Haiti, coupled with instability and an intense number of kidnappings. One report states that the source of violence in Haiti "is a lethal cocktail of abundant weapons, political polarisation and extreme urban poverty." Ex. 19, p.98.

Second, the Court notes that 5 years have passed since Matter of J-E- was decided In 2002. In Matter of J-E-, the Board indicated that Haiti was making progress in addressing prison conditions. However, it appears that prison conditions have not improved in the last five years and in fact; have further deteriorated. In Matter of J-E-, the information available to the Board indicated that criminal deportees were detained for weeks; now reports indicate that criminal deportees

can be detained for months at a time, if not indefinitely. In addition to the prison information from the Department of State and UNHCR' highlighted supra, the respondent has also submitted a report by an advocacy organization called Alternative Chance (dated January 15, 2007) which describes overcrowded conditions in police station holding cells where prisoners are not provided food, water, medical care, or telephone access. (Ex. 19, p. 39).

Third, reports indicate that criminal deportees are being held by Haitian governmental authorities despite a Haitian court ruling prohibiting the detention of these individuals. The 2006 Department of State Country Report, as stated above, indicates that criminal deportees maybe detained for several months and notes that in September 2006, a Haitian court ruled that this form of detention was unlawful, though authorities continue to detain these deportees in violation of this ruling. See 2006 State Department Country Report, supra.

Fourth, many criminal deportees are held Indefinitely unless a family member secures their release. There is a strong likelihood that respondent could be held in deplorable prison conditions indefinitely. The evidence indicates that criminal deportees are held indefinitely, though they maybe released, as noted supra, if a family member vouches for them. Since respondent has no one in Haiti to assist him, it is very likely that he could be detained for several months, if not indefinitely. The respondent and his mother both testified that the respondent has no family members living in Haiti

and there would be no one in Haiti who could "vouch" for the respondent or provide food or other necessities to the respondent during his detention. A news report from the BBC states that detainees who have no relatives in Haiti go hungry because there is no one available to bring them food Ex. 19, p. 57-61. Although the respondent's mother would most likely assist the respondent as much as she could, she is a United States citizen and has a life here in the U.S. She cannot be expected to stay in Haiti indefinitely. Furthermore, the respondent's mother, though unharmed on prior trips to Haiti, is in a very distinct situation from the respondent. Ms. Themistol is a U.S.C. who speaks fluent Creole, and is not a criminal deportee, whereas the respondent would be a criminal deportee with minimal Creole language abilities, and no one to "vouch" for him in detention.

Fifth, unlike the respondent in Matter of J-E-, who apparently had spent about 10-11 years in the United States at the time of his case, the respondent in the present case has spent 25 years in the U.S., having arrived as a young child. The respondent has provided documentation of mistreatment of those in Haiti who appear "American." See Ex. 19, p. 40-41, 52-54. Certain physical characteristics can identify a deportee as someone who spent time in America. Respondent speaks very little Creole and is not familiar with Haiti since he has not been there for the majority of his life. The respondent appears to be in relatively good health and since he has spent the majority of his life in the United States, he could be identified in Haiti as an "American" based on his physical appearance, language, and mannerisms.

Other Physical Suffering and Harm

It appears that the respondent could suffer physical mistreatment, such as beatings, if returned to Haiti as a criminal deportee and placed in a Haitian jail or prison. However, even if beatings do not rise to the level of torture in the form of physical pain, the respondent is still "more likely than not" to be tortured while detained as a criminal deportee in Haiti. In a Memorandum Opinion for the Deputy Attorney General dated December 30, 2004, the Acting Assistant Attorney General at the time states that the U.S. Senate attached an "understanding" to its resolution of advice and consent to ratification of the CAT which included the following: "in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering." Ex. 20, p. 14. In analyzing the degree of pain and suffering, the Memorandum cited a D.C. Circuit case which stated "[t]he more intense, lasting, or heinous the agony, the more likely it is to be torture." Id. at 17. It was the conclusion of the Office of General Counsel that "under sonic circumstances 'severe physical suffering' may constitute torture even if it does not involve 'severe physical pain.'" Id. at 18. The Memorandum goes onto note that "under some circumstances, 'physical suffering' may be of sufficient intensity and duration to meet the statutory definition of torture even if it does not involve 'severe physical pain. Id. at 19. This form of "severe physical suffering" would require "a condition

of some extended duration or persistence as well as intensity." Id. With regard to "intent," the Memorandum notes that intentional action can be found where an individual "knows that the result is practically certain to follow from his conduct, whatever his desire maybe as to that result." Id. at 22. The Memorandum expresses that specific intent is met where an individual "consciously desire[s]" his or her actions "to inflict severe physical or mental pain or suffering" and that "if an individual acted in good faith, and only after reasonable investigation establish[ed] that his conduct would not inflict severe physical or mental pain or suffering," then that individual would be unlikely to have the requisite "specific intent" to commit torture Id. at 23. The continued detention of criminal deportees in Haiti is not a lawful sanction, as the criminal deportees have not committed crimes in Haiti and a court has ruled these detentions unlawful. The Haitian authorities are aware of the conditions in their prisons and jails and yet no progress has been made to improve these conditions in the last five years. As noted above in various country reports, detainees often go without food or clean water in crowded, unsanitary conditions. In this case, the respondent, as a criminal deportee with no family in Haiti, would be subjected to severe physical suffering indefinitely, which amounts to torture.

Conclusion

Based on the respondent's testimony and the evidence in the record, the Court finds that the respondent has not suffered past torture, but has shown that it is "more likely than not" that he would suffer future torture by the government of Haiti or

someone acting on behalf of the government. The respondent has shown that it is "more likely than not" that he would be jailed by the government of Haiti indefinitely upon his return to Haiti, which would be tantamount to torture due to the extended nature of detention, the extremely poor conditions in the facilities which have not improved over time, and a lack of basic necessities, including food and water. The respondent lacks family in Haiti to either supply him with food and other provisions or to "vouch" for him in order to get him released. Furthermore, conditions in Haitian prisons have only worsened since Matter of J-E- was decided in 2002, and the respondent has provided extensive documentation of these conditions. As the respondent has satisfied his burden of proof, his application for deferral of removal to Haiti under the Convention Against Torture will be granted. The Court enters the following orders in this case:

Orders

IT IS HEREBY ORDERED that any applications for asylum or voluntary departure be **PRE-TERMITTED** and **DENIED.**

IT IS FURTHER ORDERED that the respondent's application for withholding of removal under § 241(b)(3) of the Act be **DENIED.**

IT IS FURTHER ORDERED that, the respondent's application for withholding of removal under the Convention Against Torture by **DENIED.**

IT IS FURTHER ORDERED that the respondent's application for deferral of removal under Article 3 of the Convention Against Torture be **GRANTED.**

IT IS FURTHER ORDERED that the respondent be removed from the United States to Haiti on the Section 212(a)(6)(A)(i) charge contained in the Notice to Appear and the Section 212(a)(2)(A)(i)(II) charge contained in the Form I-261 in Exhibit 9. Because the respondent has been granted relief under Article 3 of the Convention Against Torture, his removal from the United States to Haiti is deferred until such time as the deferral is terminated under 8 C.F.R. § 1208,17. Furthermore, this grant of deferral of removal: (1) does not confer upon the respondent any lawful or permanent immigration status in the United States; (2) will not necessarily result in the respondent being released from the custody of DHS if the alien is subject to such custody; (3) is effective only until terminated; and (4) is subject to review and termination, if the Court determines that it is not likely that the respondent would be tortured in the country to which removal has been deferred, or if the respondent requests that deferral be terminated. See 8 C.F. R. §§ 1208.17(b)(1)(i)-(iv) and (c). Deferral of removal only precludes DHS from removing the respondent to the particular country (Haiti) in which this Court has determined that the respondent is likely to be tortured; the respondent may be removed at anytime to another country where the respondent is not likely to be tortured. See 8 C.F.R. § 1208.17(b)(2).

Date: May 3, 2007

Kristin W. Olmanson
Immigration Judge

APPENDIX H

PROVISIONS OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT

(Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85)

Article 1

1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

. . . .

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

APPENDIX I

EXCERPTS OF THE CONGRESSIONAL RECORD—SENATE

PROCEEDINGS AND DEBATES OF THE 101ST CONGRESS, SECOND SESSION

(136 Cong. Rec. S17, 486, S17,491 (Oct. 27, 1990))

The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

(1)(a) That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subject to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

. . . . .

APPENDIX J

PROVISIONS OF THE SENATE EXECUTIVE REPORT ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT

(S. Exec. Rep. No. 101-30 (Aug. 30, 1990))

SUMMARY AND ANALYSIS

ARTICLE I

[T]he requirement of intent to cause severe pain and suffering is of particular importance in the case of alleged mental pain and suffering, as well as in cases where unexpectedly severe physical suffering is caused. Because specific intent is required, an act that results in unanticipated and unintended severity of pain and suffering is not torture for purposes of this Convention. . . .

APPENDIX K

PROVISIONS OF THE DEPARTMENT OF JUSTICE REGULATIONS CONCERNING THE CONVENTION AGAINST TORTURE

(8 C.F.R. §§ 208.16 - 208.18)

§ 208.16. Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

. . . .

(c) Eligibility for withholding of removal under the Convention Against Torture.

(1) For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub. L. 105–277, 112 Stat. 2681, 2681–821). The definition of torture contained in § 208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or

she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

(3) In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.

(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is

subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under §208.17(a).

. . . .

§ 208.18. Implementation of the Convention Against Torture

(a) Definitions. The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser

forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

(3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

(4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

(5) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

(6) In order to constitute torture an act must be directed against a person in the offender's custody or physical control.

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

(8) Noncompliance with applicable legal procedural standards does not *per se* constitute torture.

APPENDIX L

OFFICE OF LEGAL COUNSEL OPINION

Legal Standards Applicable Under 18 U.S.C. §§ 2340 - 2340A, at 2 (Dec. 30, 2004)

This opinion interprets the federal criminal prohibition against torture codified at 18 U.S.C. §§ 2340-2340A. It supersedes in its entirety the August 1, 2002 opinion of this Office entitled Standards of Conduct under 18 U.S.C. §§ 2340-2340A.

That statute prohibits conduct "specifically intended to inflict severe physical or mental pain or suffering." This opinion concludes that "severe" pain under the statute is not limited to "excruciating or agonizing" pain or pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death."

The statute also prohibits certain conduct specifically intended to cause "severe physical suffering" distinct from "severe physical pain."

December 30, 2004

MEMORANDUM OPINION FOR THE
DEPUTY ATTORNEY GENERAL

Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal

law, for example, 18 U.S.C. §§ 2340-2340A; international agreements, exemplified by the United Nations Convention Against Torture (the "CAT");[1] customary international law;[2] centuries of Anglo-American law;[3] and the longstanding policy of the United States, repeatedly and recently reaffirmed by the President.[4]

---

[1] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. *See also, e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

[2] It has been suggested that the prohibition against torture has achieved the status of *jus cogens* (*i.e.*, a peremptory norm) under international law. *See, e.g., Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992); *Regina v Bow Street Metro. Stipendiary Magistrate Ex Parte Pinochet Ugarte (No. 3)*, [2000] 1 AC 147, 198; *see also* Restatement (Third) of Foreign Relations Law of the United States § 702 reporters' note 5.

[3] *See generally* John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (1977).

[4] *See, e.g.*, Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167 (July 5, 2004) ("Freedom from torture is an inalienable human right . . . ."); Statement on United Nations International Day in Support of Victims of Torture, 39 Weekly Comp. Pres. Doc. 824 (June 30, 2003) ("Torture anywhere is an affront to human dignity everywhere."); *see also Letter of Transmittal from President Ronald Reagan to the Senate* (May 20, 1988), *in Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. Treaty Doc. No. 100-20, at iii (1988) ("Ratification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice unfortunately still prevalent in the world today.").

This Office interpreted the federal criminal prohibition against torture – codified at 18 U.S.C. §§ 2340-2340A – in *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002) ("August 2002 Memorandum"). The August 2002 Memorandum also addressed a number of issues beyond interpretation of those statutory provisions, including the President's Commander-in-Chief power, and various defenses that might be asserted to avoid potential liability under sections 2340-2340A. *See id.* at 31-46.

Questions have since been raised, both by this Office and by others, about the appropriateness and relevance of the non-statutory discussion in the August 2002 Memorandum, and also about various aspects of the statutory analysis, in particular the statement that "severe" pain under the statute was limited to pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." *Id.* at 1.[5] We decided to withdraw the August 2002 Memorandum, a decision you announced in June 2004. At that time, you directed this Office to prepare a replacement memorandum. Because of the importance of – and public interest in – these issues,

---

[5] *See, e.g.*, Anthony Lewis, *Making Torture Legal*, N.Y. Rev. of Books, July 15, 2004; R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos*, Wash. Post, July 4, 2004, at A12; Kathleen Clark & Julie Mertus, *Torturing the Law; the Justice Department's Legal Contortions on Interrogation*, Wash. Post, June 20, 2004, at B3; Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 Cornell L. Rev. 97 (2004).

you asked that this memorandum be prepared in a form that could be released to the public so that interested parties could understand our analysis of the statute.

This memorandum supersedes the August 2002 Memorandum in its entirety.[6] Because the discussion in that memorandum concerning the President's Commander-in-Chief power and the potential defenses to liability was – and remains – unnecessary, it has been eliminated from the analysis that follows. Consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture.[7]

---

[6] This memorandum necessarily discusses the prohibition against torture in sections 2340-2340A in somewhat abstract and general terms. In applying this criminal prohibition to particular circumstances, great care must be taken to avoid approving as lawful any conduct that might constitute torture. In addition, this memorandum does not address the many other sources of law that may apply, depending on the circumstances, to the detention or interrogation of detainees (for example, the Geneva Conventions; the Uniform Code of Military Justice, 10 U.S.C. § 801 et seq.; the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261-3267; and the War Crimes Act, 18 U.S.C. § 2441, among others). Any analysis of particular facts must, of course, ensure that the United States complies with all applicable legal obligations.

[7] *See, e.g.*, Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167-68 (July 5, 2004) ("America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture . . . in all territory under our jurisdiction. . . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere.").

We have also modified in some important respects our analysis of the legal standards applicable under 18 U.S.C. §§ 2340-2340A. For example, we disagree with statements in the August 2002 Memorandum limiting "severe" pain under the statute to "excruciating and agonizing" pain, *id.* at 19, or to pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death," *id.* at 1. There are additional areas where we disagree with or modify the analysis in the August 2002 Memorandum, as identified in the discussion below.[8]

The Criminal Division of the Department of Justice has reviewed this memorandum and concurs in the analysis set forth below.

I.

Section 2340A provides that "[w]hoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life."[9] Section 2340(1)

---

[8] While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.

[9] Section 2340A provides in full:

> (a) Offense.--Whoever outside the United States commits or attempts to commit torture shall be
>
> (continued...)

defines "torture" as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."[10]

(footnote continued)

> fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.
>
> (b) Jurisdiction.--There is jurisdiction over the activity prohibited in subsection (a) if--
>
> (1) the alleged offender is a national of the United States; or
>
> (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.
>
> (c) Conspiracy.--A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

18 U.S.C. § 2340A (2000).

[10] Section 2340 provides in full:

> As used in this chapter--
>
> (1) "torture" means an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(continued...)

In interpreting these provisions, we note that Congress may have adopted a statutory definition of "torture" that differs from certain colloquial uses of the term. *Cf. Cadet v. Bulger*, 377 F.3d 1173, 1194 (11th Cir. 2004) ("[I]n other contexts and under other definitions [the conditions] might be described as torturous. The fact remains, however, that the only relevant definition of 'torture' is the definition

---

(footnote continued)

> (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from--
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (C) the threat of imminent death; or
>
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and
>
> (3) "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

18 U.S.C. § 2340 (as amended by Pub. L. No. 108-375, 118 Stat. 1811 (2004)).

contained in [the] CAT. . . ."). We must, of course, give effect to the statute as enacted by Congress.[11]

Congress enacted sections 2340-2340A to carry out the United States' obligations under the CAT. *See* H.R. Conf. Rep. No. 103-482, at 229 (1994). The CAT, among other things, obligates state parties to take effective measures to prevent acts of torture in any territory under their jurisdiction, and requires the United States, as a state party, to ensure that acts of torture, along with attempts and complicity to commit such acts, are crimes under U.S. law. *See* CAT arts. 2, 4-5. Sections 2340-2340A satisfy that requirement with respect to acts committed outside the United States.[12] Conduct constituting "torture" occurring within the United States was – and remains – prohibited by various other federal and state criminal statutes that we do not discuss here.

The CAT defines "torture" so as to require the intentional infliction of "severe pain or suffering, whether physical or mental." Article 1(1) of the CAT provides:

---

[11] Our task is only to offer guidance on the meaning of the statute, not to comment on policy. It is of course open to policymakers to determine that conduct that might not be prohibited by the statute is nevertheless contrary to the interests or policy of the United States.

[12] Congress limited the territorial reach of the federal torture statute, providing that the prohibition applies only to conduct occurring "outside the United States," 18 U.S.C. § 2340A(a), which is currently defined in the statute to mean outside "the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States." Id. § 2340(3).

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Senate attached the following understanding to its resolution of advice and consent to ratification of the CAT:

> The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or

> application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30, at 36 (1990). This understanding was deposited with the U.S. instrument of ratification, *see* 1830 U.N.T.S. 320 (Oct. 21, 1994), and thus defines the scope of the United States' obligations under the treaty. *See Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 32-33 (1987). The criminal prohibition against torture that Congress codified in 18 U.S.C. §§ 2340-2340A generally tracks the prohibition in the CAT, subject to the U.S. understanding.

II.

Under the language adopted by Congress in sections 2340-2340A, to constitute "torture," the conduct in question must have been "specifically intended to inflict severe physical or mental pain or suffering." In the discussion that follows, we will separately consider each of the principal components of this key phrase: (1) the meaning of "severe"; (2) the meaning of "severe physical pain or suffering"; (3) the meaning of "severe mental pain or

suffering"; and (4) the meaning of "specifically intended."

(1) The meaning of "severe."

Because the statute does not define "severe," "we construe [the] term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The common understanding of the term "torture" and the context in which the statute was enacted also inform our analysis.

Dictionaries define "severe" (often conjoined with "pain") to mean "extremely violent or intense: *severe pain*." *American Heritage Dictionary of the English Language* 1653 (3d ed. 1992); *see also* XV *Oxford English Dictionary* 101 (2d ed. 1989) ("Of pain, suffering, loss, or the like: Grievous, extreme" and "Of circumstances . . . : Hard to sustain or endure").[13]

---

[13] Common dictionary definitions of "torture" further support the statutory concept that the pain or suffering must be severe. *See Black's Law Dictionary* 1528 (8th ed. 2004) (defining "torture" as "[t]he infliction of *intense pain* to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure") (emphasis added); *Webster's Third New International Dictionary of the English Language Unabridged* 2414 (2002) (defining "torture" as "the infliction of *intense pain* (as from burning, crushing, wounding) to punish or coerce someone") (emphasis added); *Oxford American Dictionary and Language Guide* 1064 (1999) (defining "torture" as "the infliction of *severe bodily pain*, esp. as a punishment or a means of persuasion") (emphasis added).

This interpretation is also consistent with the history of torture. *See generally* the descriptions in Lord Hope's lecture, *Torture*, University of Essex/Clifford Chance Lecture 7-8 (Jan. 28, 2004), and in Professor Langbein's book, *Torture and the Law of Proof: Europe and England in the Ancien Régime*. We emphatically are not saying that only such historical

(continued...)

The statute, moreover, was intended to implement the United States' obligations under the CAT, which, as quoted above, defines as "torture" acts that inflict "severe pain or suffering" on a person. CAT art. 1(1). As the Senate Foreign Relations Committee explained in its report recommending that the Senate consent to ratification of the CAT:

> The [CAT] seeks to define "torture" in a relatively limited fashion, corresponding to the common understanding of torture as an extreme practice which is universally condemned. . . .
>
> . . .
>
> The term "torture," in United States and international usage, is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.

S. Exec. Rep. No. 101-30, at 13-14. *See also* David P. Stewart, *The Torture Convention and the Reception*

(footnote continued)

techniques--or similar ones--can constitute "torture" under sections 2340-2340A. But the historical understanding of "torture" is relevant to interpreting Congress's intent. *Cf. Morissette v. United States*, 342 U.S. 246, 263 (1952).

of International Criminal Law Within the United States, 15 Nova L. Rev. 449, 455 (1991) ("By stressing the extreme nature of torture, . . . [the] definition [of torture in the CAT] describes a relatively limited set of circumstances likely to be illegal under most, if not all, domestic legal systems.").

Further, the CAT distinguishes between torture and "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1." CAT art. 16. The CAT thus treats torture as an "extreme form" of cruel, inhuman, or degrading treatment. *See* S. Exec. Rep. No. 101-30, at 6, 13; *see also* J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 80 (1988) ("*CAT Handbook*") (noting that Article 16 implies "that torture is the *gravest form* of [cruel, inhuman, or degrading] treatment [or] punishment") (emphasis added); Malcolm D. Evans, *Getting to Grips with Torture*, 51 Int'l & Comp. L.Q. 365, 369 (2002) (The CAT "formalises a distinction between torture on the one hand and inhuman and degrading treatment on the other by attributing different legal consequences to them.").[14] The Senate Foreign

[14] This approach--distinguishing torture from lesser forms of cruel, inhuman, or degrading treatment--is consistent with other international law sources. The CAT's predecessor, the U.N. Torture Declaration, defined torture as "an *aggravated* and deliberate form of cruel, inhuman or degrading treatment or punishment." Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or (continued...)

(footnote continued)

Degrading Treatment or Punishment, U.N. Res. 3452, art. 1(2) (Dec. 9, 1975) (emphasis added); *see also* S. Treaty Doc. No. 100-20 at 2 (The U.N. Torture Declaration was "a point of departure for the drafting of the [CAT]."). Other treaties also distinguish torture from lesser forms of cruel, inhuman, or degrading treatment. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, 213 U.N.T.S. 221 (Nov. 4, 1950) ("European Convention") ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."); Evans, *Getting to Grips with Torture*, 51 Int'l & Comp. L.Q. at 370 ("[T]he ECHR organs have adopted . . . a 'vertical' approach . . . , which is seen as comprising three separate elements, each representing a progression of seriousness, in which one moves progressively from forms of ill-treatment which are 'degrading' to those which are 'inhuman' and then to 'torture'. The distinctions between them is [*sic*] based on the severity of suffering involved, with 'torture' at the apex."); Debra Long, Association for the Prevention of Torture, *Guide to Jurisprudence on Torture and Ill-Treatment: Article 3 of the European Convention for the Protection of Human Rights* 13 (2002) (The approach of distinguishing between "torture," "inhuman" acts, and "degrading" acts has "remained the standard approach taken by the European judicial bodies. Within this approach torture has been singled out as carrying a special stigma, which distinguishes it from other forms of ill-treatment."). *See also CAT Handbook* at 115-17 (discussing the European Court of Human Rights ("ECHR") decision in *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978) (concluding that the combined use of wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink constituted inhuman or degrading treatment but not torture under the European Convention)). Cases decided by the ECHR subsequent to *Ireland* have continued to view torture as an aggravated form of inhuman treatment. *See, e.g.*, *Aktas v. Turkey*, No. 24351/94 ¶ 313 (E.C.H.R. 2003); *Akkoc v. Turkey*, Nos. 22947/93 & 22948/93 ¶ 115 (E.C.H.R. 2000); *Kaya v. Turkey*, No. 22535/93 ¶ 117 (E.C.H.R. 2000).

The International Criminal Tribunal for the Former Yugoslavia ("ICTY") likewise considers "torture" as a category of conduct more severe than "inhuman treatment." *See, e.g.*,

(continued...)

Relations Committee emphasized this point in its report recommending that the Senate consent to ratification of the CAT. *See* S. Exec. Rep. No. 101-30, at 13 ("'Torture' is thus to be distinguished from lesser forms of cruel, inhuman, or degrading treatment or punishment, which are to be deplored and prevented, but are not so universally and categorically condemned as to warrant the severe legal consequences that the Convention provides in the case of torture. . . . The requirement that torture be an extreme form of cruel and inhuman treatment is expressed in Article 16, which refers to 'other acts of cruel, inhuman or degrading treatment or punishment *which do not amount to torture* . . . .'"). *See also Cadet*, 377 F.3d at 1194 ("The definition in CAT draws a critical distinction between 'torture' and 'other acts of cruel, inhuman, or degrading punishment or treatment.'").

Representations made to the Senate by Executive Branch officials when the Senate was considering the CAT are also relevant in interpreting the CAT's torture prohibition – which sections 2340-2340A implement. Mark Richard, a Deputy Assistant Attorney General in the Criminal Division, testified that "[t]orture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct." *Convention Against Torture:*

(footnote continued)

Prosecutor v. Delalic, IT-96-21, Trial Chamber Judgment ¶ 542 (ICTY Nov. 16, 1998) ("[I]nhuman treatment is treatment which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture.").

Hearing Before the Senate Comm. on Foreign Relations, 101st Cong. 16 (1990) ("*CAT Hearing*") (prepared statement). The Senate Foreign Relations Committee also understood torture to be limited in just this way. *See* S. Exec. Rep. No. 101-30, at 6 (noting that "[f]or an act to be 'torture,' it must be an extreme form of cruel and inhuman treatment, causing severe pain and suffering, and be intended to cause severe pain and suffering"). Both the Executive Branch and the Senate acknowledged the efforts of the United States during the negotiating process to strengthen the effectiveness of the treaty and to gain wide adherence thereto by focusing the Convention "on torture rather than on other relatively less abhorrent practices." *Letter of Submittal from George P. Shultz, Secretary of State, to President Ronald Reagan* (May 10, 1988), *in* S. Treaty Doc. No. 100-20, at v; *see also* S. Exec. Rep. No. 101-30, at 2-3 ("The United States" helped to focus the Convention "on torture rather than other less abhorrent practices."). Such statements are probative of a treaty's meaning. *See* 11 Op. O.L.C. at 35-36.

Although Congress defined "torture" under sections 2340-2340A to require conduct specifically intended to cause "severe" pain or suffering, we do not believe Congress intended to reach only conduct involving "excruciating and agonizing" pain or suffering. Although there is some support for this formulation in the ratification history of the CAT,[15]

[15] Deputy Assistant Attorney General Mark Richard testified: "[T]he essence of torture" is treatment that inflicts (continued...)

a proposed express understanding to that effect[16] was "criticized for setting too high a threshold of pain," S. Exec. Rep. No. 101-30, at 9, and was not adopted. We are not aware of any evidence suggesting that the standard was raised in the statute and we do not believe that it was.[17]

(footnote continued)

"excruciating and agonizing physical pain." *CAT Hearing* at 16 (prepared statement).

[16] *See* S. Treaty Doc. No. 100-20, at 4-5 ("The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.").

[17] Thus, we do not agree with the statement in the August 2002 Memorandum that "[t]he Reagan administration's understanding that the pain be 'excruciating and agonizing' is in substance not different from the Bush administration's proposal that the pain must be severe." August 2002 Memorandum at 19. Although the terms are concededly imprecise, and whatever the intent of the Reagan Administration's understanding, we believe that in common usage "excruciating and agonizing" pain is understood to be more intense than "severe" pain.

The August 2002 Memorandum also looked to the use of "severe pain" in certain other statutes, and concluded that to satisfy the definition in section 2340, pain "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." *Id.* at 1; *see also id.* at 5-6, 13, 46. We do not agree with those statements. Those other statutes define an "emergency medical condition," for purposes of providing health benefits, as "a condition manifesting itself by acute symptoms of sufficient severity (including severe pain)" such that one could reasonably expect that the absence of immediate medical care might result in death, organ failure or impairment of bodily function. *See, e.g.*, 8 U.S.C. § 1369 (2000); 42 U.S.C. § 1395w-22(d)(3)(B) (2000); *id.* § 1395dd(e) (2000). They do not define "severe pain" (continued...)

Drawing distinctions among gradations of pain (for example, severe, mild, moderate, substantial, extreme, intense, excruciating, or agonizing) is obviously not an easy task, especially given the lack of any precise, objective scientific criteria for measuring pain.[18] We are, however, aided in this

---

(footnote continued)

even in that very different context (rather, they use it as an indication of an "emergency medical condition"), and they do not state that death, organ failure, or impairment of bodily function cause "severe pain," but rather that "severe pain" may indicate a condition that, if untreated, could cause one of those results. We do not believe that they provide a proper guide for interpreting "severe pain" in the very different context of the prohibition against torture in sections 2340-2340A. *Cf. United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (phrase "wages paid" has different meaning in different parts of Title 26); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997) (term "employee" has different meanings in different parts of Title VII).

[18] Despite extensive efforts to develop objective criteria for measuring pain, there is no clear, objective, consistent measurement. As one publication explains:

> Pain is a complex, subjective, perceptual phenomenon with a number of dimensions--intensity, quality, time course, impact, and personal meaning--that are uniquely experienced by each individual and, thus, can only be assessed indirectly. *Pain is a subjective experience and there is no way to objectively quantify it.* Consequently, assessment of a patient's pain depends on the patient's overt communications, both verbal and behavioral. Given pain's complexity, one must assess not only its somatic (sensory) component but also patients' moods, attitudes, coping efforts, resources, responses of family members, and the impact of pain on their lives.

(continued...)

task by judicial interpretations of the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note (2000). The TVPA, also enacted to implement the CAT, provides a civil remedy to victims of torture. The TVPA defines "torture" to include:

> any act, directed against an individual in the offender's custody or physical control, by which *severe pain or suffering* (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), *whether physical or mental*, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind
>
> . . . .

28 U.S.C. § 1350 note, § 3(b)(1) (emphases added). The emphasized language is similar to section 2340's

---

(footnote continued)

Dennis C. Turk, *Assess the Person, Not Just the Pain*, Pain: Clinical Updates, Sept. 1993 (emphasis added). This lack of clarity further complicates the effort to define "severe" pain or suffering.

"severe physical or mental pain or suffering."[19] As the Court of Appeals for the District of Columbia Circuit has explained:

> The severity requirement is crucial to ensuring that the conduct proscribed by the [CAT] and the TVPA is sufficiently extreme and outrageous to warrant the universal condemnation that the term "torture" both connotes and invokes. The drafters of the [CAT], as well as the Reagan Administration that signed it, the Bush Administration that submitted it to Congress, and the Senate that ultimately ratified it, therefore all sought to ensure that "only acts of a certain gravity shall be considered to constitute torture."
>
> The critical issue is the degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the victim. The more intense, lasting, or heinous the agony, the more likely it is to be torture.

Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 92-93 (D.C. Cir. 2002) (citations omitted). That court concluded that a complaint that alleged beatings at the hands of police but that did not provide details concerning "the severity of

---

[19] Section 3(b)(2) of the TVPA defines "mental pain or suffering" similarly to the way that section 2340(2) defines "severe mental pain or suffering."

plaintiffs' alleged beatings, including their frequency, duration, the parts of the body at which they were aimed, and the weapons used to carry them out," did not suffice "to ensure that [it] satisf[ied] the TVPA's rigorous definition of torture." *Id.* at 93.

In *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230 (D.C. Cir. 2003), the D.C. Circuit again considered the types of acts that constitute torture under the TVPA definition. The plaintiff alleged, among other things, that Libyan authorities had held her incommunicado and threatened to kill her if she tried to leave. *See id.* at 232, 234. The court acknowledged that "these alleged acts certainly reflect a bent toward cruelty on the part of their perpetrators," but, reversing the district court, went on to hold that "they are not in themselves so unusually cruel or sufficiently extreme and outrageous as to constitute torture within the meaning of the [TVPA]." *Id.* at 234. Cases in which courts have found torture suggest the nature of the extreme conduct that falls within the statutory definition. *See, e.g.*, *Hilao v. Estate of Marcos*, 103 F.3d 789, 790-91, 795 (9th Cir. 1996) (concluding that a course of conduct that included, among other things, severe beatings of plaintiff, repeated threats of death and electric shock, sleep deprivation, extended shackling to a cot (at times with a towel over his nose and mouth and water poured down his nostrils), seven months of confinement in a "suffocatingly hot" and cramped cell, and eight years of solitary or near-solitary confinement, constituted torture); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1332-40, 1345-46 (N.D. Ga. 2002) (concluding that a course of conduct that included, among other

things, severe beatings to the genitals, head, and other parts of the body with metal pipes, brass knuckles, batons, a baseball bat, and various other items; removal of teeth with pliers; kicking in the face and ribs; breaking of bones and ribs and dislocation of fingers; cutting a figure into the victim's forehead; hanging the victim and beating him; extreme limitations of food and water; and subjection to games of "Russian roulette," constituted torture); *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 22-23 (D.D.C. 2001) (entering default judgment against Iraq where plaintiffs alleged, among other things, threats of "physical torture, such as cutting off . . . fingers, pulling out . . . fingernails," and electric shocks to the testicles); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 64-66 (D.D.C. 1998) (concluding that a course of conduct that included frequent beatings, pistol whipping, threats of imminent death, electric shocks, and attempts to force confessions by playing Russian roulette and pulling the trigger at each denial, constituted torture).

(2) The meaning of "severe physical pain or suffering."

The statute provides a specific definition of "severe mental pain or suffering," *see* 18 U.S.C. § 2340(2), but does not define the term "severe physical pain or suffering." Although we think the meaning of "severe physical pain" is relatively straightforward, the question remains whether Congress intended to prohibit a category of "severe physical suffering" distinct from "severe physical pain." We conclude that under some circumstances "severe physical suffering" may constitute torture

even if it does not involve "severe physical pain." Accordingly, to the extent that the August 2002 Memorandum suggested that "severe physical suffering" under the statute could in no circumstances be distinct from "severe physical pain," *id.* at 6 n.3, we do not agree.

We begin with the statutory language. The inclusion of the words "or suffering" in the phrase "severe physical pain or suffering" suggests that the statutory category of physical torture is not limited to "severe physical pain." This is especially so in light of the general principle against interpreting a statute in such a manner as to render words surplusage. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Exactly what is included in the concept of "severe physical suffering," however, is difficult to ascertain. We interpret the phrase in a statutory context where Congress expressly distinguished "physical pain or suffering" from "mental pain or suffering." Consequently, a separate category of "physical suffering" must include something other than any type of "mental pain or suffering."[20] Moreover, given that Congress precisely defined "mental pain or

[20] Common dictionary definitions of "physical" confirm that "physical suffering" does not include mental sensations. *See, e.g., American Heritage Dictionary of the English Language* at 1366 ("Of or relating to the body as distinguished from the mind or spirit"); *Oxford American Dictionary and Language Guide* at 748 ("of or concerning the body (*physical exercise; physical education*)").

suffering" in the statute, it is unlikely to have intended to undermine that careful definition by including a broad range of mental sensations in a "physical suffering" component of "physical pain or suffering."[21] Consequently, "physical suffering" must be limited to adverse "physical" rather than adverse "mental" sensations.

---

[21] This is particularly so given that, as Administration witnesses explained, the limiting understanding defining mental pain or suffering was considered necessary to avoid problems of vagueness. *See, e.g., CAT Hearing* at 8, 10 (prepared statement of Abraham Sofaer, Legal Adviser, Department of State: "The Convention's wording . . . is not in all respects as precise as we believe necessary. . . . [B]ecause [the Convention] requires establishment of criminal penalties under our domestic law, we must pay particular attention to the meaning and interpretation of its provisions, especially concerning the standards by which the Convention will be applied as a matter of U.S. law. . . . [W]e prepared a codified proposal which . . . clarifies the definition of mental pain and suffering."); *id.* at 15-16 (prepared statement of Mark Richard: "The basic problem with the Torture Convention--one that permeates all our concerns--is its imprecise definition of torture, especially as that term is applied to actions which result solely in mental anguish. This definitional vagueness makes it very doubtful that the United States can, consistent with Constitutional due process constraints, fulfill its obligation under the Convention to adequately engraft the definition of torture into the domestic criminal law of the United States."); *id.* at 17 (prepared statement of Mark Richard: "Accordingly, the Torture Convention's vague definition concerning the mental suffering aspect of torture cannot be resolved by reference to established principles of international law. In an effort to overcome this unacceptable element of vagueness in Article I of the Convention, we have proposed an understanding which defines severe mental pain constituting torture with sufficient specificity to . . . meet Constitutional due process requirements.").

The text of the statute and the CAT, and their history, provide little concrete guidance as to what Congress intended separately to include as "severe physical suffering." Indeed, the record consistently refers to "severe physical pain or suffering" (or, more often in the ratification record, "severe physical pain *and* suffering"), apparently without ever disaggregating the concepts of "severe physical pain" and "severe physical suffering" or discussing them as separate categories with separate content. Although there is virtually no legislative history for the statute, throughout the ratification of the CAT – which also uses the disjunctive "pain or suffering" and which the statutory prohibition implements – the references were generally to "pain *and* suffering," with no indication of any difference in meaning. The *Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which appears in S. Treaty Doc. No. 100-20, at 3, for example, repeatedly refers to "pain *and* suffering." *See also* S. Exec. Rep. No. 101-30, at 6 (three uses of "pain and suffering"); *id.* at 13 (eight uses of "pain and suffering"); *id.* at 14 (two uses of "pain and suffering"); *id.* at 35 (one use of "pain and suffering"). Conversely, the phrase "pain or suffering" is used less frequently in the Senate report in discussing (as opposed to quoting) the CAT and the understandings under consideration, *e.g.*, *id.* at 5-6 (one use of "pain or suffering"), *id.* at 14 (two uses of "pain or suffering"); *id.* at 16 (two uses of "pain or suffering"), and, when used, it is with no suggestion that it has any different meaning.

Although we conclude that inclusion of the words "or suffering" in "severe physical pain or suffering" establishes that physical torture is not limited to "severe physical pain," we also conclude that Congress did not intend "severe physical pain or suffering" to include a category of "physical suffering" that would be so broad as to negate the limitations on the other categories of torture in the statute. Moreover, the "physical suffering" covered by the statute must be "severe" to be within the statutory prohibition. We conclude that under some circumstances "physical suffering" may be of sufficient intensity and duration to meet the statutory definition of torture even if it does not involve "severe physical pain." To constitute such torture, "*severe* physical suffering" would have to be a condition of some extended duration or persistence as well as intensity. The need to define a category of "severe physical suffering" that is different from "severe physical pain," and that also does not undermine the limited definition Congress provided for torture, along with the requirement that any such physical suffering be "severe," calls for an interpretation under which "severe physical suffering" is reserved for physical distress that is "severe" considering its intensity and duration or persistence, rather than merely mild or transitory.[22]

---

[22] Support for concluding that there is an extended temporal element, or at least an element of persistence, in "severe physical suffering" as a category distinct from "severe physical pain" may also be found in the prevalence of concepts of "endurance" of suffering and of suffering as a "state" or "condition" in standard dictionary definitions. *See, e.g.*, *Webster's Third New International Dictionary* at 2284 (defining

(continued...)

Otherwise, the inclusion of such a category would lead to the kind of uncertainty in interpreting the statute that Congress sought to reduce both through its understanding to the CAT and in sections 2340-2340A.

(3) The meaning of "severe mental pain or suffering."

Section 2340 defines "severe mental pain or suffering" to mean:

> the prolonged mental harm caused by or resulting from –
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (C) the threat of imminent death; or

(footnote continued)

"suffering" as "the endurance of or submission to affliction, pain, loss"; "a pain endured"); *Random House Dictionary of the English Language* 1901 (2d ed. 1987) ("the state of a person or thing that suffers"); *Funk & Wagnalls New Standard Dictionary of the English Language* 2416 (1946) ("A state of anguish or pain"); *American Heritage Dictionary of the English Language* at 1795 ("The condition of one who suffers").

> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality[.]

18 U.S.C. § 2340(2). Torture is defined under the statute to include an act specifically intended to inflict severe mental pain or suffering. *Id.* § 2340(1).

An important preliminary question with respect to this definition is whether the statutory list of the four "predicate acts" in section 2340(2)(A)-(D) is exclusive. We conclude that Congress intended the list of predicate acts to be exclusive – that is, to constitute the proscribed "severe mental pain or suffering" under the statute, the prolonged mental harm must be caused by acts falling within one of the four statutory categories of predicate acts. We reach this conclusion based on the clear language of the statute, which provides a detailed definition that includes four categories of predicate acts joined by the disjunctive and does not contain a catchall provision or any other language suggesting that additional acts might qualify (for example, language such as "including" or "such acts as").[24] Congress

---

[24] These four categories of predicate acts "are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). *See also, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); 2A (continued...)

plainly considered very specific predicate acts, and this definition tracks the Senate's understanding concerning mental pain or suffering when giving its advice and consent to ratification of the CAT. The conclusion that the list of predicate acts is exclusive is consistent with both the text of the Senate's understanding, and with the fact that it was adopted out of concern that the CAT's definition of torture did not otherwise meet the requirement for clarity in defining crimes. *See supra* note 21. Adopting an interpretation of the statute that expands the list of predicate acts for "severe mental pain or suffering" would constitute an impermissible rewriting of the statute and would introduce the very imprecision that prompted the Senate to adopt its understanding when giving its advice and consent to ratification of the CAT.

Another question is whether the requirement of "prolonged mental harm" caused by or resulting from one of the enumerated predicate acts is a separate requirement, or whether such "prolonged mental harm" is to be presumed any time one of the predicate acts occurs. Although it is possible to read the statute's reference to "*the* prolonged mental harm caused by or resulting from" the predicate acts as creating a statutory presumption that each of the predicate acts always causes prolonged mental harm, we do not believe that was Congress's intent. As

---

(footnote continued)

Norman J. Singer, *Statutes and Statutory Construction* § 47.23 (6th ed. 2000). Nor do we see any "contrary indications" that would rebut this inference. *Venn*, 535 U.S. at 65.

noted, this language closely tracks the understanding that the Senate adopted when it gave its advice and consent to ratification of the CAT:

> in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30, at 36. We do not believe that simply by adding the word "the" before "prolonged harm," Congress intended a material change in the definition of mental pain or suffering as articulated in the Senate's understanding to the CAT. The legislative history, moreover, confirms that sections 2340-2340A were intended to fulfill – but not go beyond – the United States' obligations under the CAT: "This section provides the necessary

legislation to implement the [CAT]. . . . The definition of torture emanates directly from article 1 of the [CAT]. The definition for 'severe mental pain and suffering' incorporates the [above mentioned] understanding." S. Rep. No. 103-107, at 58-59 (1993). This understanding, embodied in the statute, was meant to define the obligation undertaken by the United States. Given this understanding, the legislative history, and the fact that section 2340(2) defines "severe mental pain or suffering" carefully in language very similar to the understanding, we do not believe that Congress intended the definition to create a presumption that any time one of the predicate acts occurs, prolonged mental harm is deemed to result.

Turning to the question of what constitutes "prolonged mental harm caused by or resulting from" a predicate act, we believe that Congress intended this phrase to require mental "harm" that is caused by or that results from a predicate act, and that has some lasting duration. There is little guidance to draw upon in interpreting this phrase.[24] Nevertheless, our interpretation is consistent with the ordinary meaning of the statutory terms. First,

[24] The phrase "prolonged mental harm" does not appear in the relevant medical literature or elsewhere in the United States Code. The August 2002 Memorandum concluded that to constitute "prolonged mental harm," there must be "significant psychological harm of significant duration, e.g., lasting for months or even years." *Id.* at 1; *see also id.* at 7. Although we believe that the mental harm must be of some lasting duration to be "prolonged," to the extent that that formulation was intended to suggest that the mental harm would have to last for at least "months or even years," we do not agree.

the use of the word "harm" – as opposed to simply repeating "pain or suffering" – suggests some mental damage or injury. Ordinary dictionary definitions of "harm," such as "physical or mental *damage: injury*," *Webster's Third New International Dictionary* at 1034 (emphasis added), or "[p]hysical or psychological *injury or damage*," *American Heritage Dictionary of the English Language* at 825 (emphasis added), support this interpretation. Second, to "prolong" means to "lengthen in time" or to "extend in duration," or to "draw out," *Webster's Third New International Dictionary* at 1815, further suggesting that to be "prolonged," the mental damage must extend for some period of time. This damage need not be permanent, but it must continue for a "prolonged" period of time.[25] Finally, under section

[25] For example, although we do not suggest that the statute is limited to such cases, development of a mental disorder--such as post-traumatic stress disorder or perhaps chronic depression--could constitute "prolonged mental harm." *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 369-76, 463-68 (4th ed. 2000) ("DSM-IV-TR"). *See also, e.g.*, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/59/324, at 14 (2004) ("The most common diagnosis of psychiatric symptoms among torture survivors is said to be post-traumatic stress disorder."); *see also* Metin Basoglu et al., *Torture and Mental Health: A Research Overview*, *in* Ellen Gerrity et al. eds., *The Mental Health Consequences of Torture* 48-49 (2001) (referring to findings of higher rates of post-traumatic stress disorder in studies involving torture survivors); Murat Parker et al., *Psychological Effects of Torture: An Empirical Study of Tortured and Non-Tortured Non Political Prisoners*, *in* Metin Basoglu ed., *Torture and Its Consequences: Current Treatment Approaches* 77 (1992) (referring to findings of post-traumatic stress disorder in torture survivors).

2340(2), the "prolonged mental harm" must be "caused by" or "resulting from" one of the enumerated predicate acts.[26]

Although there are few judicial opinions discussing the question of "prolonged mental harm," those cases that have addressed the issue are consistent with our view. For example, in the TVPA case of *Mehinovic*, the court explained that:

> [The defendant] also caused or participated in the plaintiffs' mental torture. Mental torture consists of "prolonged mental harm caused by or resulting from: the intentional infliction or threatened infliction of severe physical pain or suffering; . . . the threat of imminent death . . . ." As set out above, plaintiffs noted in their testimony that they feared that they would be killed by [the defendant] during the beatings he inflicted or during games of "Russian roulette." *Each plaintiff continues to suffer long-term psychological harm as a result of*

[26] This is not meant to suggest that, if the predicate act or acts continue for an extended period, "prolonged mental harm" cannot occur until after they are completed. Early occurrences of the predicate act could cause mental harm that could continue--and become prolonged--during the extended period the predicate acts continued to occur. For example, in *Sackie v. Ashcroft*, 270 F. Supp. 2d 596, 601-02 (E.D. Pa. 2003), the predicate acts continued over a three-to-four-year period, and the court concluded that "prolonged mental harm" had occurred during that time.

the ordeals they suffered at the hands of defendant and others.

198 F. Supp. 2d at 1346 (emphasis added; first ellipsis in original). In reaching its conclusion, the court noted that the plaintiffs were continuing to suffer serious mental harm even ten years after the events in question: One plaintiff "suffers from anxiety, flashbacks, and nightmares and has difficulty sleeping. [He] continues to suffer thinking about what happened to him during this ordeal and has been unable to work as a result of the continuing effects of the torture he endured." *Id.* at 1334. Another plaintiff "suffers from anxiety, sleeps very little, and has frequent nightmares. . . . [He] has found it impossible to return to work." *Id.* at 1336. A third plaintiff "has frequent nightmares. He has had to use medication to help him sleep. His experience has made him feel depressed and reclusive, and he has not been able to work since he escaped from this ordeal." *Id.* at 1337-38. And the fourth plaintiff "has flashbacks and nightmares, suffers from nervousness, angers easily, and has difficulty trusting people. These effects directly impact and interfere with his ability to work." *Id.* at 1340. In each case, these mental effects were continuing years after the infliction of the predicate acts.

And in *Sackie v. Ashcroft*, 270 F. Supp. 2d 596 (E.D. Pa. 2003), the individual had been kidnapped and "forcibly recruited" as a child soldier at the age of 14, and over the next three to four years had been forced to take narcotics and threatened with imminent death. *Id.* at 597-98, 601-02. The court concluded that the resulting mental harm, which

continued over this three-to-four-year period, qualified as "prolonged mental harm." *Id.* at 602.

Conversely, in *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003), the court rejected a claim under the TVPA brought by individuals who had been held at gunpoint overnight and repeatedly threatened with death. While recognizing that the plaintiffs had experienced an "ordeal," the court concluded that they had failed to show that their experience caused lasting damage, noting that "there is simply no allegation that Plaintiffs have suffered any prolonged mental harm or physical injury as a result of their alleged intimidation." *Id.* at 1294-95.

(4) The meaning of "specifically intended."

It is well recognized that the term "specific intent" is ambiguous and that the courts do not use it consistently. *See* 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.2(e), at 355 & n.79 (2d ed. 2003). "Specific intent" is most commonly understood, however, "to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime." *Id.* at 354; *see also Carter v. United States*, 530 U.S. 255, 268 (2000) (explaining that general intent, as opposed to specific intent, requires "that the defendant possessed knowledge [only] with respect to the *actus reus* of the crime"). As one respected treatise explains:

> With crimes which require that the defendant intentionally cause a specific result, what is meant by an "intention" to cause that result? Although the

> theorists have not always been in agreement . . . , the traditional view is that a person who acts . . . intends a result of his act . . . under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.

1 LaFave, *Substantive Criminal Law*, § 5.2(a), at 341 (footnote omitted).

As noted, the cases are inconsistent. Some suggest that only a conscious desire to produce the proscribed result constitutes specific intent; others suggest that even reasonable foreseeability suffices. In *United States v. Bailey*, 444 U.S. 394 (1980), for example, the Court suggested that, at least "[i]n a general sense," *id.* at 405, "specific intent" requires that one consciously desire the result. *Id.* at 403-05. The Court compared the common law's *mens rea* concepts of specific intent and general intent to the Model Penal Code's *mens rea* concepts of acting purposefully and acting knowingly. *Id.* at 404-05. "[A] person who causes a particular result is said to act purposefully," wrote the Court, "if 'he consciously desires that result, whatever the likelihood of that result happening from his conduct.'" *Id.* at 404 (internal quotation marks omitted). A person "is said to act knowingly," in contrast, "if he is aware 'that that result is practically certain to follow from his conduct, whatever his desire may be as to that

result.'" *Id.* (internal quotation marks omitted). The Court then stated: "In a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent." *Id.* at 405.

In contrast, cases such as *United States v. Neiswender*, 590 F.2d 1269 (4th Cir. 1979), suggest that to prove specific intent it is enough that the defendant simply have "knowledge or notice" that his act "would have likely resulted in" the proscribed outcome. *Id.* at 1273. "Notice," the court held, "is provided by the reasonable foreseeability of the natural and probable consequences of one's acts." *Id.*

We do not believe it is useful to try to define the precise meaning of "specific intent" in section 2340.[27] In light of the President's directive that the United States not engage in torture, it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture. Some observations, however, are appropriate. It is clear that the specific intent element of section 2340 would be met if a defendant performed an act and "consciously desire[d]" that act to inflict severe physical or mental pain or suffering. 1 LaFave, *Substantive Criminal Law* § 5.2(a), at 341.

[27] In the August 2002 Memorandum, this Office concluded that the specific intent element of the statute required that infliction of severe pain or suffering be the defendant's "precise objective" and that it was not enough that the defendant act with knowledge that such pain "was reasonably likely to result from his actions" (or even that that result "is certain to occur"). *Id.* at 3-4. We do not reiterate that test here.

Conversely, if an individual acted in good faith, and only after reasonable investigation establishing that his conduct would not inflict severe physical or mental pain or suffering, it appears unlikely that he would have the specific intent necessary to violate sections 2340-2340A. Such an individual could be said neither consciously to desire the proscribed result, *see, e.g.*, *Bailey*, 444 U.S. at 405, nor to have "knowledge or notice" that his act "would likely have resulted in" the proscribed outcome, *Neiswender*, 590 F.2d at 1273.

Two final points on the issue of specific intent: First, specific intent must be distinguished from motive. There is no exception under the statute permitting torture to be used for a "good reason." Thus, a defendant's motive (to protect national security, for example) is not relevant to the question whether he has acted with the requisite specific intent under the statute. *See Cheek v. United States*, 498 U.S. 192, 200-01 (1991). Second, specific intent to take a given action can be found even if the defendant will take the action only conditionally. *Cf., e.g.*, *Holloway v. United States*, 526 U.S. 1, 11 (1999) ("[A] defendant may not negate a proscribed intent by requiring the victim to comply with a condition the defendant has no right to impose."). *See also id.* at 10-11 & nn. 9-12; Model Penal Code § 2.02(6). Thus, for example, the fact that a victim might have avoided being tortured by cooperating with the perpetrator would not make permissible actions otherwise constituting torture under the statute. Presumably that has frequently been the

case with torture, but that fact does not make the practice of torture any less abhorrent or unlawful.[28]

DANIEL LEVIN

Acting Assistant Attorney General

Office of Legal Counsel

[28] In the August 2002 Memorandum, this Office indicated that an element of the offense of torture was that the act in question actually result in the infliction of severe physical or mental pain or suffering. *See id.* at 3. That conclusion rested on a comparison of the statute with the CAT, which has a different definition of "torture" that requires the actual infliction of pain or suffering, and we do not believe that the statute requires that the defendant actually inflict (as opposed to act with the specific intent to inflict) severe physical or mental pain or suffering. *Compare* CAT art. 1(1) ("the term 'torture' means any act by which severe pain or suffering, whether physical or mental, *is intentionally inflicted*") (emphasis added) *with* 18 U.S.C. § 2340 ("'torture' means an act . . . *specifically intended to inflict* severe physical or mental pain or suffering") (emphasis added). It is unlikely that any such requirement would make any practical difference, however, since the statute also criminalizes attempts to commit torture. *Id.* § 2340A(a).